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SUPREME COURT OF THE UNITED STATES

October Term, 1936.

No. 781

C. R. TOWNSEND AND PARK BERNHARD, A PARTNERSHIP KNOWN AS TOWNSEND & BERNHARD, DOING BUSINESS AS COOK COUNTY WAREHOUSE, ET AL.,

Appellants,

vs.

M. J. YEOMANS, ATTORNEY GENERAL FOR THE STATE OF GEORGIA, ET AL.,

Appellees.

BRIEF FOR APPELLEES

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April 26, 1937.

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BRIEF FOR APPELLEES

STATEMENT OF CASE

In this case there is brought in question the constitutional validity of an Act of the General Assembly of Georgia, approved March 28, 1935, regulating the operation of tobacco warehouses in the State of Georgia and fixing the maximum amount of fees and commissions which may be charged by tobacco warehousemen for services rendered the growers. (Ga. L. 1935, pp. 476, 477, 478.) A copy of the Act is attached to the Bill of Complaint, marked Exhibit A (R. 15). A copy is also set out in Appellants' brief.

There are forty-four complainants, all being members of the Association of Georgia Tobacco Warehousemen and constituting all of the persons and corporations engaged in the operation of tobacco warehouses in the State of Georgia at the time the Bill of Complaint was filed in 1935. Others engaging in the business since that time have been made parties by intervention. The defendants are M. J. Yeomans, as Attorney General of the State of Georgia, and the several Solicitors General of the Superior Courts of the Judicial Circuits in Georgia in which tobacco warehousemen operate, the Solicitors of the City Courts of the several counties comprising the Bright Leaf Tobacco Belt, and the sheriffs of the several counties included in said Tobacco Belt. By their bill as amended, appellants assert that the Act contravenes Article 1, Section 8, Paragraph 3 of the Constitution of the United States and also the due process of law clause of the Fourteenth Amendment.

Appellees justify the Act as a proper and legitimate exercise of the police power of the State of Georgia. They further contend that the Act does not, either as to form or operative effect, unconstitutionally burden or interfere with interstate commerce.

A brief statement of the nature of the Bright Leaf Tobacco industry and the manner in which tobacco warehouses are operated, as disclosed by the petition as amended and the evidence, is necessary, as we think, in the determination of the issues presented and such statement will be made although it may be necessary in the course of argument to refer to certain parts of the record in greater detail.

The industry as a whole is confined to the States of North Carolina, South Carolina, Virginia, Georgia, and in addition thereto small quantities are grown in Kentucky and Tennessee. North Carolina leads all other states in production insofar as

volume and value are concerned. South Carolina comes second and in the Carolinas and Virginia the industry is one of long standing. See Court's finding of fact, paragraph 5 (R. 77). Approximately twenty years ago it was discovered that the soil in certain parts of South Georgia is adapted to the growth of Bright Leaf Tobacco. The industry began to assume noticeable proportions about the year 1917. The infant industry in Georgia was nurtured by the tobacco interests of the old tobacco states, particularly North Carolina, South Carolina and Virginia. The growers availed themselves of the experience of the growers in other states and it appears that for a number of years supposed experienced tobacco growers, called "demonstrators" were employed by the Georgia growers to advise and assist in the growing and curing of their crops. See Paragraph 5 Court's finding (R. 77). The manufacture of tobacco is concentrated in the hands of only a few companies and accordingly there are only a few prospective buyers. The buyers or manufacturers are in position, in part, at least, to restrict or dominate the local markets. An example of this is the fact that the buyers will furnish to any one market only two sets of buyers, (evidence F. W. Brown, R. 190) and in cooperation with the warehousemen fix the date on which the markets open and, in effect, determine the date on which it closes (evidence F. W. Brown, R. 196), Court's finding, Paragraph 7 (R. 79). All these things considered, it was but natural that the system which had prevailed in the older states for the marketing of tobacco with its attendant vices and virtues, if any, should be adopted in Georgia. Some of those who had operated tobacco warehouses in the older states, or had been connected with the operation of such warehouses there, came forward to Georgia with the advance of the industry in this new field and opened warehouses in and through which the Georgia crops might be sold. These operators did not make the State of Georgia their home but remained only during the tobacco warehouse selling season and then re-

turned to their homes and businesses in other states. Accordingly, a large portion of the Georgia crop from year to year has been, and now is, sold in warehouses operated by proprietors who have no local ties whatever. With them self-interest has not the restraints which local ties or community interests beget. Under such conditions the sole pecuniary interest of the individual operator might easily become the sole motive that dominates his financial operation, with the usual attendant conditions of imposition, excessive charges and inferior service.

The development of a new industry also usually attracts those who are disposed to speculate and exploit. The development of the tobacco industry in Georgia has not been free from these elements. The actual result of this motive operating throughout the territory was the construction of warehouses and opening of markets faster than the territory grew and at other places in the center of the territory the construction of warehouses was out of proportion to the appropriate needs of the industry. For instance, in the year 1931, 51 warehouses made reports to the Commissioner of Agriculture from 21 separate points or markets. By 1933 the number of warehouses in the territory making reports had been reduced from 51 to 43 and the number of points from which these reports came had been reduced from 21 to 15. See consolidation of reports to Commissioner of Agriculture, complainants' Exhibits Nos. 5 to 8 (R. 666 to 669). It is also shown without contradiction in the evidence that markets were opened during these years at Bainbridge, Cairo, Thomasville, Quitman, Camilla, Claxon, Fitzgerald, and probably other points, and that the markets in all of these places have been discontinued. In 1934 there were 39 warehouses reporting to the Commissioner of Agriculture from 15 separate markets and in 1935 the number of warehouses had increased to 44, all reporting from the same 15

markets. See consolidation of reports to Commissioner of Agriculture (R. 668-669).

Nevertheless the nature of the industry and the scope of the territory permit the handling of the volume of crops from year to year by comparatively few warehouses. As stated before, there were only 44 operating during the year 1935 when the Bill of Complaint was filed and in prior years the number had been fewer. This condition easily admits of combinations on the part of the warehousemen with respect to their operation and agreements with respect to their charges.

The grower carries his tobacco to the warehouse of his choice. It is placed on the floor for sale and all sales are conducted by auction. In the normal and customary course of marketing tobacco in Georgia, the grower can only sell his tobacco in warehouses located in the tobacco belt. See Court's finding, paragraph 8. (R. 79). Evidence B. B. Saunders (R. 147), evidence F. W. Brown (R. 189). All warehouses are conducted in the same manner. The grower has no option save to offer his crop in some one of the warehouses in the belt, all operating according to the same method. From the beginning of the industry charges for services rendered to the grower by the warehouseman have been practically uniform throughout the territory. The only competition as between the warehousemen themselves is the claim that the one warehouseman can, either by personal influence or mental acumen induce or force the buyers to give a better price for the same grade of tobacco than the other warehousemen can procure for a like grade of tobacco. About the year 1927, by a concert of action or common consent, the schedule of charges for services of warehousemen to the grower in the sale of his tobacco was brought to a uniform level throughout the Georgia belt and in most instances the prices charged were raised. Evidence R. E. Currin (R. 527,

528), evidence W. D. Dickerson (R. 560-564), evidence H. B. Wallace (R. 324). Complainants' original bill, paragraph 8 (d) (R. 9). Evidence F. W. Brown (R. 187 and 188). Defendants' Exhibits 1-A, 2-A and 3 (R. 624, 634, 644). Defendants' Exhibits 8 (R. 657), 9 (R. 659), 10 (R. 662). The only competition between the warehousemen is in contacts, kindness, courtesy and service to the grower. There is no competition as to charges. Evidence F. W. Brown (R. 191).

So that when the Act here under attack was passed appellants had and were observing a common, uniform charge for services and such charge had been in effect for a number of years prior thereto.

In addition, among the warehousemen, there had been organized what is known as the Tobacco Warehousemen's Association, of which all appellants are members. Indeed, the prosecution of this suit is an organized fight through the Warehousemen's Association. Evidence F. W. Brown (R. 197). The growers are not eligible for membership. Evidence F. W. Brown (R. 196). The Association and buyers determine the date the market in Georgia opens and substantially determine the date on which it closes. Evidence F. W. Brown (R. 196). The Association undertakes to deal with such practices as affect the interests of the members and adopt regulatory rules to be observed by such members. Evidence F. W. Brown (R. 189). A new member is admitted when he becomes identified with the tobacco warehouse business in Georgia and promises to be governed in his charges by the schedule of fees then in effect throughout the State of Georgia as fixed by the Association. Evidence H. B. Wallace (R. 325). On page 94 of the minutes of the Association of the meeting of May 8, 1934, the following entry appears:

"The secretary was requested to read letter of president

Brown to Mr. J. C. Lanier requesting that no reduction be made in commissions or charges by the Georgia Warehousemen for the year 1934 season. After discussion of the matter it was decided that no changes should be made in charges, but that if any were made it would be higher instead of lower." (R. 652).

See also paragraph 20 of Court's finding and note that no exception is taken to any statement of fact set out in said paragraph. Appellants exception to this paragraph relates only to the last sentence to the effect that appellants "through the Warehousemen's Association and their common agreement as to fees to be charged by them for services rendered maintain and enjoy a 'virtual' monopoly in the field covered by their operations." See assignment of error No. 6 (R. 102). There is no challenge as to the correctness of any other finding of fact set out in paragraph 20 of the Court's finding.

Furthermore, it appears that wasteful practices had developed in the operation of the warehouses. For instance, many of the warehousemen were undertaking, as a part of their warehouse services, to haul the tobacco of some of the growers from the farm to the market. While it appears from the evidence that the warehousemen themselves had undertaken through their association to eliminate this practice, it nevertheless is shown that some of the warehousemen, even during the year 1935, by indirection, were following a practice which the Association itself condemned: Evidence R. E. Lyddanne (R. 217), evidence J. C. Meadors (R. 383-384), evidence J. M. Easterly (R. 266). Other wasteful practices, particularly in the matter of employing what are called solicitors had developed. A large part of the work of the so-called solicitors can not be held to be a part of the warehouse service and is indeed without any value whatsoever to the grower. Evidence of Park Bernard (R. 377).

Evidence of John S. Bernard (R. 408). A practice of loaning or advancing money by warehousemen to faithful customers had also developed and the losses, if any, sustained were charged as a part of the operating expenses of the warehousemen. Evidence J. M. Easterly, (R. 266), evidence R. A. George (R. 332), evidence W. W. Bernard (R. 341). These practices when followed resulted necessarily in discrimination as between the tobacco growers and made the burden which they severally bear for the services as a whole unequal.

In addition, the tobacco industry in South Georgia has developed into one of the paramount industries of the state. See complainants' amendment, page 10 (R. 41). A large number of the citizens of South Georgia are growers of tobacco and accordingly are vitally and immediately interested in the industry and as well in the service rendered by warehousemen and charges made for such services. See Court's finding, paragraph 5 (R. 77), and on the whole there existed at the time of the passage of the Georgia Act a situation or combination of circumstances materially restricting the regulatory force of competition so that the growers were placed at a disadvantage with respect to the amount charged for service rendered in the sale of tobacco grown by them from year to year.

By the second amendment to the Bill of Complaint (R. 52), it is charged that the handling and sale of tobacco on the floors of the warehouses are transactions in interestate or foreign commerce and that the State of Georgia, as appellants contend, is without power to tax or otherwise put a burden upon or regulate such commerce.

A determination of this question necessarily requires an examination of the facts as to the manner in which tobacco is received and sold in the warehouses and a brief statement of

the facts relating to this issue will be made at this time. The manner of marketing loose leaf tobacco in Georgia as disclosed by the Record and the evidence in this case is as follows:

After the tobacco is taken from the stalk and cured, the grower grades the leaves into piles, which are usually tied up in burlap sheets to be taken to the market. When the selling season opens, he loads the tied up piles of tobacco on a conveyance and transports them to the town or market where he desires to offer his tobacco for sale.

Upon reaching the warehouse of his choice, the tobacco is unloaded from the conveyance, the sheets are removed from the piles, and the amount contained in each sheet is placed on a flat basket. The basket is then placed on a hand truck and trucked to the scales for weighing. A card showing the name of the grower and the weight of the pile of tobacco in each particular basket is then placed on top of the pile. The basket containing the tobacco with the identifying card is then trucked by hand to the warehouse floor and the baskets are placed in parallel rows, preparatory to the auction sale. The tobacco then remains on the floor for a period of time varying from a few hours to several days. That is to say, it remains on the floor until the buyers, in their round of buying from warehouse to warehouse, reach the particular warehouse for the auction sale. For the service incident to the handling and weighing of the tobacco as thus set out, a charge is made by the warehouseman to the grower and the portion of the statute prescribing the maximum charge for this service is one of the items under attack in this suit.

When the buyers representing the different tobacco companies reach the warehouse where the tobacco has been placed on the floor the sale begins, and an auctioneer furnished by the

warehouseman proceeds along each row and auctions off each pile of tobacco to the highest bidder. The warehouseman bids on and buys some of the tobacco in order to boost the price at his warehouse. And when tobacco is bought by him in this manner it is usually held for several days or weeks until he considers the time opportune to sell it and he then places it on the floor and offers it for sale at auction. If the price bid for any particular basket of tobacco is unsatisfactory to the grower, he merely follows the auction sale and within a reasonable time turns the identifying card face down and this act according to the customs of the trade indicates that the offer submitted is rejected. Under the custom of the business he is permitted then to remove his tobacco from that warehouse, or to place it in some position so that the auctioneer will reach it again in the same sale or at a later sale. The grower indicates his willingness to accept the offer by failing, within a reasonable time, to turn the identifying card face down.

Thus the legal effect of the transaction is that the auctioneer representing the warehouseman only receives a proposal from the proposed purchaser and, in fact, no sale is actually completed until after such proposal is accepted by the grower. The grower thereby maintains absolute control and dominion of his tobacco throughout the whole process and until after the warehouseman has performed all of the service to the grower which he is supposed to perform for him.

If the offer of the proposed buyer is accepted by the grower the particular pile of tobacco is within a reasonable time taken charge of by a representative of the buyer and trucked to one side of the warehouse with a view of being shipped. At the time the purchase is completed, there is no ascertained destination of the tobacco involved in any particular transaction. The purchaser has absolute control and dominion over it and may

subsequently ship it out of the State of Georgia or to a point in the State of Georgia or may store it in the city where it is bought or do none of these things as he elects. While it is true that most of the tobacco buyers who participate in the tobacco sales are employees of the large tobacco companies and while it is also true that there are no cigarette manufacturing plants in Georgia, it is shown that some of the large buyers first ship the tobacco purchased by them respectively to redrying plants located in the State of Georgia. Others, within a short time after the purchase, ship the tobacco to points outside the state. The record does not disclose the percentage of the tobacco sold on the Georgia market which is first shipped to redrying plants in that state. (Evidence F. W. Brown, R. 191, and Evidence of A. W. Jeffries, R. 414.)

Reverting for a moment to the procedure in connection with the sales of the tobacco by the warehousemen in the tobacco warehouses it should be noted that the warehouseman, after the sale is made, furnishes each grower with a statement of the sales completed for the grower and this statement shows the weight of each pile sold, the price per pound paid, the price of the entire pile and the sum of all the piles, the amount of warehouse charges deducted and the net proceeds. The warehouseman, for the purchaser, remits to the grower the net proceeds and retains for himself the amount of the warehouse charges deducted.

It is the charge made by the warehouseman to the grower for this combined service as warehouseman that the Georgia statute attempts to regulate. The statute only undertakes to fix the maximum amount that may be charged as commission on the sale value of the tobacco, the auction fee and the fee or charge for weighing and handling. Further than this it does not attempt to go and it is quite clear that the regulation relates

solely to the transaction between the grower and the warehouseman. No complaint is made as to any features of the Act except the parts prescribing the maximum charge for weighing and handling and the auction fee. (Paragraph 6, Bill, R. 9.)

The statute does not attempt to regulate or affect the business of the purchaser. It does not undertake to prescribe when the tobacco purchased by him shall be transported out of the State or how it shall be transported or to what place it shall be transported. It does not undertake to prescribe the minimum price that the purchaser shall pay for the tobacco purchased by him or how he shall use it or where he shall use it or what profit he shall make on his purchase. The Act does not undertake to interfere with the prompt, safe and convenient transit of the tobacco purchased from the State of Georgia to any other place in or out of the state by one who wishes to transport it. The Act does not undertake to set up any economic barrier between the State of Georgia and any other state or foreign country and it does not undertake to create any condition of economic isolation as between the State of Georgia and any other state, territory, or foreign country. After the purchase of the tobacco by the purchaser he may hold it at his pleasure, ship it at his pleasure, use it at his pleasure, and make from such use and manufacture as much profit as he can. The statute does not affect either directly or indirectly, proximately or remotely, the price the purchaser pays or offers to pay. The terms of the Act do not relate to or undertake to regulate in any respect whatever the business of the purchaser. It exacts of him no tax, and as to him makes no requirement.

On the contrary the regulation prescribed by the statute relates to and affects only the transaction between the grower and the warehouseman. The grower resides in Georgia, he produces his tobacco in Georgia, the warehouseman's business

is located in Georgia and the transaction between the grower and the warehouseman with which the statute deals all take place and are completed within the limits of said State.

SUMMARY OF ARGUMENT

I.

THE ACT DOES NOT BURDEN INTERSTATE COMMERCE IN CONTRAVENTION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION EITHER IN FORM OR EFFECT. (pp. 16 to 56.)

This contention is sound because:

1. The transactions which the statute undertakes to regulate are not interstate transactions but are local to the State of Georgia both in their inception and execution. The engagement between the warehouseman and grower is completed before interstate commerce begins. The transactions involved are wholly intrastate. (pp. 16 to 33.)

2. If it be held, however, that the transactions between the growers and warehousemen regulated by the statute fall within the scope or concept of interstate commerce, the burden on or interference with such commerce caused by the enforcement of the act, if any, is only indirect, accidental, incidental, secondary, remote and not substantial and arises outside of the scope and purpose of the Act and consequently does not unconstitutionally burden or interfere with such commerce. (pp. 33 to 42.)

3. Cases cited and relied on by appellant discussed and distinguished. (pp. 42 to 56.)

II.

IN THE EXERCISE OF ITS POLICE POWER THE STATE OF GEORGIA MAY FIX MAXIMUM CHARGES TO BE MADE BY TOBACCO WAREHOUSEMEN FOR SERVICES RENDERED THE GROWER. (pp. 56 to 83.)

This contention is sound because:

1. The power exercised is one properly falling within the police power of the State as that term has been defined and applied. (pp. 56 to 57.)

2. The business of tobacco warehousemen may be regulated even to the extent of prescribing maximum charges for the services rendered because the business as conducted is "affected with a public interest" and for adequate reasons is subject to legislative control and regulation. (pp. 57 to 83.)

III.

THE ACT IS NOT IN EFFECT UNREASONABLE, ARBITRARY OR CAPRICIOUS FOR ANY REASON ASSERTED. (pp. 83 to 91.)

The act cannot be held to be arbitrary, unreasonable and capricious as claimed by appellants on the asserted ground that no investigation of the subject of tobacco marketing in Georgia was made by the legislature prior to the enactment of the statute or that the legislative body was not informed as to the nature of the industry or that there was no demand for regulation by the growers themselves or that the act was not passed in response to an emergency. These are all matters addressing themselves to the legislative body and are foreclosed by the enactment of the law. Further the act is not unreasonable, arbitrary or capricious as claimed by appellants on the asserted ground that no board or other body was created to ascertain the facts or

that the statute undertakes to prescribe a hard and fast schedule of fees to be charged. (pp. 83 to 91.)

IV.

THE ALLEGATIONS OF THE BILL AS AMENDED AND THE EVIDENCE ADDUCED ARE INSUFFICIENT TO PRESENT A FEDERAL QUESTION WITH REFERENCE TO THE ALLEGED UNREASONABLENESS OF THE GEORGIA ACT FROM THE STANDPOINT OF THE REVENUE PERMITTED THEREUNDER. (pp. 91 to 102.)

This contention is sound because:

1. No sufficient facts are set out in the bill as amended to authorize the Court to pass upon the question of the reasonableness of the schedule of fees from the standpoint of revenue permitted. (pp. 95 to 97.)

2. Appellants undertake en masse and by the group to attack the act as unreasonable on the ground that the revenue permitted is insufficient. The question of the reasonableness of the act from this standpoint can be raised only by the individual proprietor or unit. The attack cannot be made in the aggregate or by groups. The group cannot make the attack for itself of for the individual and one individual cannot make the attack for another individual. (pp. 97 to 102.)

V.

PRESUMPTION AND BURDEN OF PROOF. (pp. 102 to 114.)

Appellants have failed to carry the burden placed by law upon them. (pp. 103 to 114.)

VI.

CONCLUSION. (p. 114.)

ARGUMENT

I.

THE ACT DOES NOT BURDEN INTERSTATE COMMERCE IN CONTRAVENTION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, EITHER IN FORM OR OPERATIVE EFFECT.

Appellants allege that the Act in question contravenes the commerce clause of the Federal Constitution. Their position in this respect is based on the contention that when the leaf tobacco of the grower is brought into the respective warehouses of appellants, it is placed on the floor in long rows to be offered for sale and is to be shipped out of the State by the purchaser when sold; that there are no tobacco manufacturing places in Georgia and none of the tobacco sold at the respective ware houses of appellants is manufactured in the State of Georgia and was not so manufactured in 1935; that it is the intent and purpose to sell the leaf tobacco to corporations or persons living out of the State of Georgia and that shipments are to be made out of the State of Georgia as soon as the sales are completed. Upon the basis of such allegation (Second Amendment, R. 53) it is contended that the sales in the warehouses to the purchasers are transactions in interstate commerce and that the State of Georgia is without power "to tax or otherwise put a burden upon or regulate that interstate or foreign commerce." (See Second Amendment, R. 53.)

The contention is without merit. Neither the allegations of the bill nor the evidence bring the transactions within the protection of the commerce clause of the Federal Constitution.

1. TRANSACTIONS INVOLVED ARE INTRASTATE.

In the first place it is respectfully submitted that the transactions which the statute undertakes to regulate are not interstate

in character but are local to the State of Georgia. They are local both in their inception and in their execution. They are wholly intrastate.

In some cases the courts have found it difficult to find the dividing line between purely local activities and such commerce as is protected by the commerce clause of the Federal Constitution but no difficulty has been found in such cases as that here presented.

It is to be remembered that we are not dealing now with transactions which take place in Georgia with reference to an article or commodity which had its origin in some other State, was transported into the State of Georgia, and the movement of which will be continued after the transaction in this State is completed, to still some other State. All that need be determined in this case is whether the legal incidents and characteristics of an interstate transaction have attached. In other words, does the interstate movement or transaction with reference to the tobacco industry, if any, begin before or after the transactions between the grower and the warehouseman are completed? This Court in many cases has pointed out when the interstate transaction begins and when it ends. One of the earliest cases is *Coe v. Erroll*, 116 U. S. 517 (1886).

In this case the Town of Erroll, New Hampshire, had imposed a general property tax upon certain logs which had been cut down in New Hampshire and were at the time being floated down the river to Lewiston, Maine, being temporarily detained in the Town of Erroll on tax day by low water. The question before the court was whether or not the New Hampshire logs, although intended for export and partially prepared for that purpose, were subject to tax in the same manner as other property in the State. The Court held that the commerce

clause did not relieve the logs from taxation, among other things, at page 526, saying:

> "Although intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State?"

Prior to the time of the decision in the case of *Coe v. Erroll*, supra, this court had released the case of *Brown v. Houston*, 114 U. S. 622 (1885), and in that case had declared that where articles had been shipped into a State and had arrived at their destination, their interstate movement ceased and they were no longer entitled to the protection of the commerce clause against local taxation. Many years later in *General Oil Co. v. Crain*, 209 U. S. 211 (1908), the principles of these decisions were restated and combined in the following statement of the court:

> "The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is defined in *Coe v. Erroll*, 116 U. S. 517, to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage. The latter is defined to be in *Brown v. Houston*, 114 U. S. 622, the point of time at which it arrives at its destination." Page 229 of 209 U. S.

The identical question here involved was considered by this Court in the case of *Crescent Oil Co. v. State of Mississippi*, 257 U. S. 129 (1921).

In 1914 the State of Mississippi passed a law prohibiting all corporations, whether organized under the laws of that State or authorized by the laws thereof to do local business therein,

from owning or operating any cotton gin when such corporation is interested in the manufacture of cottonseed or cottonseed meal. The Crescent Oil Company was a corporation organized under the laws of the State of Tennessee and was doing business in the State of Mississippi. It was engaged primarily in the processing of cottonseed but in order to acquire sufficient amounts for its consumption it had adopted the plan of operating cotton gins so that it might be in position more readily to acquire the seed. It operated cotton gins in the State of Mississippi and it brought suit to enjoin the enforcement of the Act upon the ground, among others, that the law imposed a burden or tax upon interstate commerce. The basis of its contention was that it intended to place the cottonseed purchased or acquired by it in Mississippi in interstate commerce for transportation to the State of Tennessee or other States for use in the prosecution of its main business. The Act in question was purely regulatory. It had no features or provisions of a tax law. Obviously it was passed under the police power of the State.

This Court, at page 135 of 257 U. S., stated the question for determination in that case to be as follows:

> "Whether a cotton gin operated by an oil company in Mississippi is rendered an instrumentality of interstate commerce by the fact that the owner of it ships out of the State for its use in another State all of the cottonseed which may be purchased in connection with its ginning operation."

It is particularly to be noted in the case cited the cottonseed were purchased in the State of Mississippi with the intent and purpose to transport them to some other State for use therein, and coming directly to the question involved, this Court at page 136 of 257 U. S., said:

"The separation of the seed from the fiber of the cotton, which is accompanied by the use of the cotton gin, is a short but important step in the manufacture of both the seed and the fiber into useful articles of commerce, but that manufacture is not commerce was held in *Kidd v. Pearson*, 128 U. S. 1, 20, 21; *United States v. E. C. Knight Co.*, 156 U. S. 1, 12, 13; *Capital City Dairy v. Ohio*, 183 U. S. 238, 345; *McCluskey v. Marysville & Northern Ry. Co.*, 243 U. S. 36, 38; *Hammer v. Dagenhart*, 247 U. S. 251, 252; and in *Arkadelphia Milling Co. v. St. Louis Southwestern Ry Co.*, 249 U. S. 134, 151, 152. And the fact, of itself, that an article when in the process of manufacture is intended for export to another State does not render it an article of interstate commerce. *Coe v. Erroll*, 116 U. S. 517; *New York Central R. Co. v. Mohney*, 252 U. S. 152, 155. When the ginning is completed the operator of the gin is free to purchase the seed or not, and if it is purchased to store it in Mississippi indefinitely, or to sell or use it in that State or to ship it out of the State for use in another State, and, under the cases cited, it is only in this last case and after the seed has been committed to a carrier for interstate transport that it passes from the regulatory power of the State to interstate commerce and under the national power.

"The application of these conclusions of law to the manufacturing operations of the cotton gins, which we have seen precede but are not a part of interstate commerce, renders it quite impossible to consider them an instrumentality of such commerce, which is burdened by the Anti-Gin Act, and the first contention of the plaintiff in error must be denied."

A more recent case is *Federal Compress & Warehouse Company v. McLean*, 291 U. S. 17; 54 S. Ct. 267 (1933).

The State of Mississippi enacted a statute providing for an excise tax or annual license tax for the privilege of operating

a cotton compress, graduated according to the number of bales of cotton compressed per annum and also for an annual license tax to be levied upon each person operating a warehouse whether in conjunction with a compress or not, likewise graduated according to the storage capacity of the warehouse. Apellant, Federal Compress & Warehouse Company, was a Delaware corporation maintaining and operating cotton warehouses and compresses at Cleveland, Mississippi. It paid the tax under protest and brought suit to recover in the State court. The court of final appeal in the State having denied its claim, an appeal was allowed to the Supreme Court of the United States.

An agreed statement of facts discloses that the compress and warehouse company was licensed by the Secretary of Agriculture to conduct a warehouse for the storage of agricultural products under the provisions of the United States Warehouse Act and had given bond for the faithful performance of its duties; that Cleveland is a shipping point for baled cotton in interstate and foreign commerce and is a market in which cotton is purchased by brokers and dealers from those who produce it in the State. The purchases are made for resale or to fill contracts for sale of cotton without the State; that in the usual course of business the purchased cotton after it is ginned is transported to the warehouse for storage and compression, about 25% arriving by automobile truck or wagon and the remainder by rail over the line of the single railroad serving Cleveland; that upon delivery to appellant it issued its negotiable warehouse receipt for the cotton in form provided by the United States Warehouse Act; that the right to demand delivery of the cotton or otherwise control its disposition was reserved to the holders of the receipts; that from one to ten per cent of the cotton handled is resold, within the state to buyers who resell it to purchasers without the state and all except a negligible part of the cotton is ultimately shipped to points

outside the state; that when shipping orders are given by the holders of the warehouse receipts the compress company compresses the cotton into bales of standard weight and size suitable for shipment and delivers them to the rail carrier for interstate transportation; that the movement of the cotton out of the warehouse is directed by the owners of it who hold the warehouse receipt; that the compress charges are paid by the carrier which it adds to the charge for carriage and that where cotton is brought to the warehouse by rail carriage, the through interstate rail rate is applied from the point of origin to destination instead of the combination rate which is the sum of the intrastate rate to Cleveland and the interstate rate from that point to destination; that the destination of the cotton outside of the state is not determined until the owner gives shipping instructions to appellant and shipments are not made until surrender of the warehouse receipts; that by written agreement with the railroad company, the compress company is designated as the agent of the railroad to receive the cotton from and deliver it to the railroad and to load and unload the cotton upon and from its cars, and by the agreement it is also provided that the railroad may use the warehouse as a cotton depot.

The contention of appellant was that the tax was a forbidden burden on interstate commerce and unconstitutional for that reason.

Answering this contention the Court says:

> "It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce, and hence is not a subject of interstate commerce immune from local taxation. When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end, and, although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin, and so

it does not become exempt from local tax until its shipment to points of destination outside the state. Before shipping orders are given it has no ascertainable destination without the state and in the meantime until surrender of the warehouse receipt it is subject to the exclusive control of the owner. Property thus withdrawn from transportation, whether interstate or intrastate, until restored to a transportation movement interstate has often been held to be subject to local taxation." Page 21 of 291 U. S.

Further the Court says:

"Here the privilege taxed is exercised before interstate commerce begins; hence the burden of the tax upon the commerce is too indirect and remote to transgress constitutional limitations. See *Nashville, Chattanooga and St. Louis Ry. Co. v. Wallace*, 288 U. S. 249. The case therefore stands on a footing different from those in which local regulations of the business of purchasing the commodity within and shipping it without the state have been deemed to impede or embarrass interstate commerce in those commodities. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282; *Lemke v. Farmers Grain Co.*, 258 U. S. 50." Page 22 of 291 U. S.

In the cited case this Court points out that even the contract which the compress and warehouse company had with the railroad by which the company was designated as the agent of the railroad and the warehouse of the company was designated as the cotton depot of the railroad was insufficient to bring the transaction within the scope of the commerce clause of the Federal Constitution. In this connection the Court says:

"It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause." Page 22 of 291 U. S.

It is true that the Federal Compress & Warehouse Company case is a tax case, but the tax involved is not a property or ad valorem tax such as was involved in the case of *Bacon v. Illinois*, 227 U. S. 504, and which the Court in the case of *Chicago Board of Trade v. Olsen*, 262 U. S. 1, held might be levied notwithstanding the fact that the property affected thereby occupied such position in a current of interstate commerce that Congress might not inconsistently with the exercise of the right of taxation by the state regulate the entire course of the transaction under the power of the commerce clause of the Federal Constitution. The tax in the Bacon case was permitted on the theory that the property had come to rest in a current of interstate transportation and had become mixed with other property of the state and thereby subject to the property tax. The tax involved in this case, however, is a business tax and is levied on the privilege of doing business and if the transaction to which it relates could in any sense be held to be interstate the levy of the tax would necessarily be a burden on interstate commerce so that a transaction held to be intrastate in its nature when viewed in the light of a privilege or business tax imposed upon it must necessarily be held to be intrastate when viewed in the light of a regulation enacted by virtue of the state's police power.

The contention of appellants in the instant case that the transaction between the grower and warehouseman is interstate is based solely upon the contention that the tobacco in the usual and ordinary course of business will ultimately reach a point outside the state. The compress and warehouse company case, however, completely answers this contention. In the ordinary and usual course of business the cotton there involved ultimately reaches points outside the state but the Court held that the transaction does not become exempt from a local business tax until actual shipment. We find in this case a complete and perfect parallel of fact for the reason that before shipping

orders are given for the tobacco it likewise has no ascertainable destination without the state and it is subject to exclusive control of the owner.

A companion but perhaps stronger case is *Chassaniol v. City of Greenwood*, 291 U. S. 584, 54 S. Ct. 541 (1934).

The City of Greenwood, Mississippi, by ordinance laid a tax upon every person engaged in the business of buying or selling cotton for himself within the city. Chassaniol was engaged in such business in said city, paid the amount of tax under protest and sued to recover. His claim was denied by the State courts of Mississippi including the court of final appeal in that state and an appeal to the Supreme Court of the United States was allowed.

Report of the case discloses that Greenwood is a concentration point for long staple cotton and an active market for its purchase and sale. All of the cotton there dealt in is grown and ginned in Mississippi. It reaches the Greenwood warehouses about 70% by rail, the rest by automobile, truck or wagon. It is there compressed, substantially in the manner described in *Federal Compress & Warehouse Company v. McLean, supra.* Purchases and sales are made upon the market by transfer and delivery of warehouse receipts issued by the local warehouses. It is further disclosed that at Greenwood about twenty-five cotton buyers including Chassaniol each purchased and sold cotton for himself. In each case the buyer became the absolute owner and makes the profit or bears the loss. When he buys cotton in the warehouses at Greenwood he customarily has in hand and in mind orders or contracts for that particular grade for immediate or future delivery in other states or countries to the extent of about ninety per cent on the average of all cotton purchased by him. In the usual course

of the business there is about ten per cent which the buyer must purchase and which he cannot use to fill orders which he had in hand for shipment to other states and this small percentage he sells to other buyers and this, like the remaining ninety per cent, usually finds its way to some point of destination outside of the State of Mississippi. It will be remembered from a statement of the facts in the Federal Compress & Warehouse Company case that the charges of the warehouse and compress companies are added to the freight bill and that in a determination of the amount of freight the through rate from the original point of origin to the ultimate point of destination is allowed rather than the local rate from the point of origin to Greenwood and the interstate rate from Greenwood to destination. Apellant Chassaniol made the contention that all the cotton so purchased and sold is in interstate commerce from the moment it leaves the gin for Greenwood or at least from the moment it is purchased at Greenwood by the buyer. His contention was exactly the same contention which appellants make in this case, namely, that the tobacco is destined for ultimate shipment to some other state or country. He accordingly contended that to tax the occupation of the cotton buyer burdens interstate commerce. The judgment of the Supreme Court of Mississippi was affirmed.

Answering the contention of appellant, Mr. Justice Brandeis, at page 587 of 291 U. S., 542 of 54 S. Ct., says:

> "Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there are each, like the growing of it, steps in preparation of the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce."

From this opinion it is to be noted that the interstate transac-

tion begins with "*the sale and shipment*" and prior to this stage each step is a transaction in intrastate commerce.

This case clearly establishes the rule that the selling of tobacco grown by a Georgia grower within the State of Georgia on a Georgia market and the buying of such tobacco by a purchaser or manufacturer is not an interstate transaction even though it may appear that the purchaser expects eventually to transport the tobacco purchased to some other state for manufacture. In this case, however, the Court will not have to go so far as the Court went in the *Chassaniol case* for the reason that the warehouseman is not the purchaser of the tobacco. He does not handle with a view of transporting to any other state and in fact has nothing to do ultimately with placing the commodity in the channel of interstate commerce.

On this particular point, attention of the court is also called to the case of *Oliver Iron Company v. Lord*, 262 U. S. 172 (1923). The purpose of the plaintiff in the Oliver Iron Company case was to restrain and prevent the enforcement of a taxing act adopted by the state of Minnesota which applied to the production of ore. The chief contention, as stated by the Court at page 177 of 262 U. S., is that mining as conducted by the plaintiffs, if not actually a part of interstate commerce, is so closely connected therewith that to tax it is to burden or interfere with such commerce. A statement of the facts discloses that the demand or market within the state for iron ore covers only a negligible percentage of what is mined by the plaintiffs. Practically all of their output was mined to fill existing contracts with consumers outside the state and the ore so mined passed at once into the channels of interstate commerce. Three-fourths of the ore came from open pit mines and one-fourth from underground mines. At the open pit mines empty cars are run from adjacent railroad yards into the mines and there loaded. Steam shovels sever the ore from its natural bed and

lift it directly into the cars. When loaded the cars are promptly returned to the railroad yards, where they are put into trains which start the ore on its interstate journey. The several steps follow in such succession that there is practical continuity of movement from the time the ore is severed from its natural bed. The operations within the mine and the movement of the cars into and out of the mine are conducted by the plaintiffs. The subsequent transportation is by public carriers. At the underground mines the plaintiffs dig the ore, bring it to the surface through shafts and put it in elevated pockets where it readily can be loaded into cars. With the underground mines the continuity of movement is not quite so close. There is some delay in loading on the cars but the subsequent movements are the same as from the open pit mines.

After stating the facts substantially as above, the Court at page 178 of 262 U. S., through Mr. Justice Van Devanter, says:

> "Plainly the facts do not support the contention. Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation. *Kidd v. Pearson*, 128 U. S. 1, 20; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 245; *Delaware, Lackawanna & Western R. R. Co. v. Yurkonic*, 238 U. S. 439, 444; *Hammer v. Dagenhart*, 247 U. S. 251, 272; *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 410. Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractural engagements, and persists even though the business be conducted in close connection with interstate commerce."

In the case here for consideration, the Court will have observed, no doubt, that in the process of marketing the tobacco through the warehouses, three separate and distinct legal relations are established.

First, there is the relation between the grower and the ware-

houseman. In the ordinary and usual course of the business, the grower presents the tobacco grown and cured by him at the warehouse of the warehouseman. For a consideration, the latter weighs the several parcels presented, places identifying cards thereon, furnishes floor space in his warehouse for the display of the tobacco and then at the proper time, through his auctioneer and others, notes the offers made by the respective buyers and records the highest bid and name of bidder on the identifying card. This concludes the engagement between the grower and the warehouseman and obviously it is entirely separate and distinct from any other relation which may be established in the process of marketing the tobacco. The service performed by the warehouseman even stops short of the consummated sale for the grower can accept the highest bid submitted by the buyers or not at his option. His right of dominion and right of possession persists after the engagement of the warehouseman is concluded.

Second, there is a relation established between the grower and buyer. After the tobacco is weighed, displayed on the floor of the warehouse and offered for sale, if the grower elects to accept the offer made, there arises between the grower and buyer the relation of vendor and vendee. In this relation the warehouseman is not concerned and has no interest.

Third, there is a relation established between the buyer and warehouseman. If the grower accepts the price offered, then the buyer within a short time removes the tobacco from the floor of the warehouse and the warehouseman for the buyer under some arrangement or agreement between himself and the buyer makes payment to the grower in the amount of the purchase price of the tobacco purchased by the buyer from the grower, but before doing so he deducts the amount of his commission and charges.

The challenged statutes relates to and actually affects only the relation between the grower and the warehouseman. It does not purport by its terms to affect any other relation and in fact does not do so. It provides that the maximum charge of the warehouseman for the service rendered by him shall not exceed the amount set out in the act, to wit, a stipulated maximum amount for weighing and handling, a stipulated maximum charge for auction fee and a stipulated maximum charge as commission on the gross sale which the warehouseman may exact for the service aforesaid rendered by him.

The only remaining provision touching the relation of the warehouseman and the grower is the provision that the warehouseman render to each seller of tobacco a bill plainly stating the amount charged for weighing and handling, the amounts charged for auctioning fees and the amounts charged for commissions on each sale. As to this last requirement, no complaint is made in the bill and the propriety and fairness of the regulation is in no way challenged by appellants.

We wish to emphasize that the act purports to deal only with the relation between the grower and the warehouseman and an examination of the functions, or elements entering into the relation between them separately, will, we believe, demonstrate beyond question that the transaction is entirely local in its nature, subject to regulation by the General Assembly of the State of Georgia under its police power and not subject to regulation by Congress under the commerce clause of the Federal Constitution even if Congress should undertake so to do.

Let us examine first the weighing service and charge separately. This is a service rendered by the warehouseman to the grower for a compensation. But suppose the warehouseman should say to the grower: "This weighing service is unprofitable to us and we do not care to render it. The laws of the State

provide for public weighers of cotton and other farm produce. Take your tobacco to the scales of a public weigher of cotton and let him weigh each parcel, certify the correct weight, place an identifying card on each parcel with the weight thereof and then bring your tobacco to my warehouse and place it on the floor. I will accept the certified weight of the public weigher and allow the tobacco to be sold on the floor of my warehouse." In the case supposed the public weigher would perform exactly the same service as the warehouseman performs in weighing the tobacco, yet who would contend that the service performed by the public weigher is not entirely local in its nature and subject to any reasonable regulation the General Assembly might see fit to impose affecting the relation between himself and the grower. Further, suppose that the warehouseman did not care to perform the service now performed by his auctioneer and the grower were permitted to employ a public auctioneer—one not employed by the warehouseman, to cooperate with the bidder, with a view of noting and declaring the highest bid offered. In such case the service rendered by the public auctioneer would be exactly the same as that rendered by the warehouseman through his auctioneer and in substance and legal effect the two transactions would be the same, yet who would contend that the relation between the local public auctioneer and the local grower is such an intimate and integral part of interstate commerce that the General Assembly is without power to enact a reasonable law affecting or regulating that relation? In other words, why must a service rendered by the warehouseman through his employee in his warehouse and on his scales be held to be an interstate transaction when the same service rendered by a local public weigher and a local public auctioneer is so plainly an intrastate transaction?

> "Interstate commerce is a practical conception and what falls within it must be determined upon a consideration of established facts and known commercial methods."

Public Utilities Commission v. Landon, 249 U. S. 236, 245 (1919).

The act here involved, as already pointed out, purports to deal only with the relation between the grower and warehouseman and under the "established facts and known commercial methods", that relation does not fall within interstate commerce. The contention of appellants to the contrary is not supported either by reason or authority. In addition to the particular cases hereinbefore cited other cases in point are: *Browning v. Waycross*, 233 U. S. 16, 22 (1914); *Merchants Exchange v. Missouri*, 248 U. S. 365 (1919); *Heisler v. Thomas Colliery Co.*, 260 U. S. 245 (1922); *Champlain Refining Co. v. Corporation Commission*, 286 U. S. 210, 235 (1932); *Nashville, etc., Ry. Co. v. Wallace*, 288 U. S. 249, 265, 266 (1933); *Edelman v. Boering Air Transport Co., Inc.*, 289 U. S. 245 (1933); *Henneford v. Silas Mason Co., Inc.*, ... U. S. ....., No. 418 October, 1936, Term.

Furthermore, the percentage of tobacco purchased by the tobacco buyers with the intention of immediate shipment is not shown in the record. On the contrary some of the largest buyers on the Georgia market do not buy with the intention of immediately shipping the tobacco purchased out of the State. But such tobacco is first shipped by them to redrying plants located in the State of Georgia, one at Douglas, one at Valdosta, and one at Tifton. While the record, as stated, does not disclose the proportionate part of the tobacco sold on the Georgia market that takes this course, yet it must be admitted to be substantial. When this tobacco leaves the several market points in Georgia it is not intended that it shall be transported out of the state until it has been subjected to a process that materially changes its character, utility and value. The particular tobacco so handled and processed certainly does not reach the channel of interstate commerce until it starts on the journey

out of the State of Georgia either to a foreign country or some other state and therefore the point at which this tobacco reaches interstate commerce is still further removed from the transaction between the grower and the warehouseman than is the case with the tobacco purchased by other companies and immediately shipped out of the State. See *Arkadelphia Milling Company v. St. Louis S. W. R. Co.*, 249 U. S. 134, 151, 63 L. ed. 517, 527 (1919); *Bacon v. Illinois*, 227 U. S. 504 (1913); *General Oil Company v. Crain*, 209 U. S. 211 (1908).

2. THE ACT DOES NOT UNCONSTITUTIONALLY BURDEN INTERSTATE COMMERCE EVEN IF THE TRANSACTION BETWEEN THE GROWER AND WAREHOUSEMAN REGULATED, FALLS WITHIN THE CONCEPT OF INTERSTATE COMMERCE.

In the second place, we respectfully contend that the challenged statute does not, either as to form or operative effect, unconstitutionally burden interstate commerce, even if it be held that the transactions between the grower and warehouseman regulated thereby fall within the concept of interstate commerce.

It must be conceded that Congress has not undertaken to deal with the subject matter to which the Georgia statute relates. Further it must be conceded that the business regulated is local and not national in scope or character. See *Brown v. Houston*, 114 U. S. 622, 630 (1885); *Public Utilities Commission v. Landon*, 249 U. S. 236, 245 (1919).

In such circumstances what must appear in order to justify the Court in declaring a state statute invalid as in contravention of the commerce clause of the Federal Constitution? It is not sufficient to show merely that the transaction involved is one in interstate commerce. On the contrary, and conceding for

the sake of argument, that the transaction involved is one in interstate commerce, the question still remains as to whether the challenged statute unconstitutionally burdens or interferes with such commerce? In other words, is the burden on, or interference with interstate commerce, if any, direct and substantial or is it indirect and incidental only? The statute can be declared unconstitutional as in contravention of the commerce clause of the Federal Constitution only when it is made to appear that the burden on or interference with interstate commerce is direct and substantial. If the burden or interference is only indirect, incidental, accidental, inconsequential and remote and arises incidentally and outside the scope and purpose of the Act, the challenged statute may be enforced as a proper exercise of the State's police power.

In this case the allegations of the bill with respect to the infringement of the commerce clause of the Federal Constitution are very general. (See Second Amendment, R. 53). The warehouseman is not the shipper of the tobacco which is sold at his house, and he does not at any time during the transaction intend or expect to put the commodity in the channels of interstate commerce. He does not expect to use it or to manufacture or process it or transport it. Therefore, it is indeed difficult to see how interstate commerce may be burdened or interfered with or how the movement of the tobacco in interstate commerce is impeded, or retarded by reason of the regulation of the price which the warehouseman may charge for the service rendered by him.

If authority on this point be needed we desire to call the Court's attention to *Hopkins v. United States*, 171 U. S. 578 (1898). This case was instituted by the United States Attorney for the District of Kansas, acting under the direction of the Attorney General of the United States against Hopkins and

other defendants under the provisions of the Act of 1890 entitled an "Act to protect trade and commerce against unlawful restraints and monopolies." The purpose of the action was to obtain the dissolution of an exchange or voluntary association of which defendants were members and known as the Kansas City Livestock Exchange. The defendants had formed the association or exchange for the purpose of selling cattle at the Kansas City stockyard. Under the custom of the trade as then conducted, growers of cattle in Nebraska, Iowa and other states would ship their cattle to Kansas City for sale. The business of the exchange was carried on and conducted at the Kansas City stockyard and the cattle so shipped in interstate commerce were sold by the members of the exchange in the Kansas City stockyard. The exchange had entered into an agreement providing for minimum charges to be made by the members of the association for services rendered and it was further provided that no member of the exchange should transact any business with any person not a member of the exchange or any person violating any rules or regulations of the exchange. It was contended in behalf of the government that the business conducted by Hopkins and other members of the exchange constituted transactions in interstate commerce and that in conducting the business as aforesaid the provisions of the act of 1890 aforesaid were violated. The defendants admitted the formation of the exchange and their membership therein and admitted that the regulations referred to by the government in its suit were in force and effect, but denied that the transactions engaged in by them were interstate commerce within the meaning of the Constitution or laws of the United States.

The Court speaking through Mr. Justice Peckham, at page 587 of 171 U. S., states the legal question involved as follows:

> "We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are en-

gaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner?"

At page 594 of 171 U. S. the Court further says:

"An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct."

At page 597 of 171 U. S. the Court further says:

"Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted. (Citing authorities.)

"But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility."

In short, the Court holds that the service rendered by the commission merchant, if affecting interstate commerce at all,

did so only indirectly and incidentally and that the act complained of did not constitute a violation of the act of 1890.

The tobacco warehousemen are not themselves the sellers or the buyers of the tobacco with intent to transport it into some other state or foreign country or to use it in any place. They occupy positions analogous to the brokers and commission merchants referred to in *Hopkins v. United States, supra.* In fact the services of the tobacco warehousemen are further removed and have less relation to interstate commerce than did the service of the commission merchants in Hopkins v. United States, for in the Hopkins case the cattle dealt with were unquestionably the subjects of interstate commerce. But the tobacco dealt with by the warehousemen does not become a subject of interstate commerce until after the transaction between the grower and warehouseman are completed.

While the facts set forth and under consideration in *Hopkins v. United States, supra,* have been distinguished from facts involved in other cases reaching and decided by the Court, at the same time the principle announced in the Hopkins case has never been criticized or overruled. In effect its soundness was recognized in the case of *Swift & Company v. United States,* 196 U. S. 375, 49 L. ed. 918, where the court said:

> "So again the line is distinct between this case and Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers."

In the very recent case of *Hartford Accident & Indemnity Company v. Illinois,* 298 U. S. 155, 80 L. ed. 1099, the Court considered the validity of an Illinois statute forbidding anyone

to receive, sell, offer or solicit consignments of farm produce to sell on commission within Illinois unless licensed, and requiring every applicant for license to make a showing as to character, respectability and good faith in the conduct of the proposed business and further requiring that a bond be posted in the sum of $5,000 with satisfactory surety conditioned on honest accounting and handling of produce received and against fraudulent conduct. The Cross Company took out the license and posted the bond required under the law signed by Hartford Accident & Indemnity Company as surety. The principal failed and the insurance company pleaded that the statute was beyond the state's power because a restriction upon and a regulation of interstate commerce. Speaking for the court Mr. Justice Roberts, among other things, said:

> "The sole question presented is the constitutional validity of the act as it affects the appellant's liability under its bond. The statute is a police regulation. The business regulated is local, having its situs within the state and being conducted therein. The fact that the commission merchant contracts to sell and sells farm produce forwarded to him from points without, as well as points within, the state is not enough to condemn the regulation of a business carried on within her borders. Such effect as the regulation has upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress by Article 1, Section 8 of the Federal Constitution. In these circumstances, until Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective."

With reference to the Illinois statute under consideration by the Court in *Hartford Accident & Indemnity Company case, supra*, it is to be noted that Congress had adopted similar but not inconsistent legislation. Here it is not contended that Congress has adopted any legislation to protect the tobacco

growers from unreasonable charges by the combination of tobacco warehousemen, although it is admitted that all tobacco growing states have passed regulatory statutes similar to the Georgia statute.

The importance of the distinction between direct and indirect effects on interstate commerce was pointed out by the Court in *Schechter v. United States*, 295 U.S. 496, 79 L. ed. 1570 (1935). In this case Mr. Chief Justice Hughes, speaking for the court, beginning at page 546 of 295 U. S., said:

> "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects . . . Direct effects are illustrated by the railroad cases we have cited, as, e. g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminates against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control."

Since we are now dealing with the question of interference with or burden on interstate commerce let us examine the challenged act to determine just what are its effects.

The direct effect of the act is, of course, to limit the charges of the several warehousemen for services rendered the grower. It may be that the aggregate earnings of the several warehousemen will be diminished. But what and whom will that condition affect and how will the effect be brought about? By reason of the reduced earnings or revenues, if such be the case, the purchasing power of appellants may be reduced. They might be required to purchase fewer and cheaper clothes and they might be required to economize in the operation of their businesses respectively and to that end engage fewer employees and by reason of that fact commerce generally, and possibly interstate commerce incidentally, would lose the stimulating effect that more spending by the warehousemen would cause. But certainly no one would contend that such effect is direct and substantial rather than indirect, incidental and remote.

The only remaining contention that the warehousemen might make on this point is that possibly under conditions of short crops and low prices, with the reduced earnings, they might not be able to maintain a high standard of efficiency in rendering the service which they purport to render and that thereby the tobacco industry might be adversely affected and the quantity actually sold and transported to other states affected and that those who buy and ship in interstate commerce might be deprived of such high standard of efficiency. But certainly the extent of the influence and effect of the act along these lines, if any, has not been shown. In fact, it cannot be shown and must necessarily be a matter of conjecture and speculation. Many times the Court has dealt with such arguments and has uniformly set them aside as furnishing no evidence of direct or substantial interference with, or burden on, interstate commerce. *United Leather Workers International Union v. Herkert*, 265 U. S. 457; *Industrial Association v. United States*, 268 U. S. 64.

In support of the legal contention which we make in this division of appellees' brief we cite additional authorities, to wit: *Munn v. Illinois*, 94 U. S. 113, 123, 135, 24 L. ed. 77, 83, 87 (1877); *Transportation Company v. Parkersburg*, 107 U. S. 691, 27 L. ed. 548 (1883); *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166 (1896); *Lakeshore & N. S. R.R. Co. v. Ohio*, 173 U. S. 285, (1899); *Cargill Company v. Minnesota*, 180 U. S. 452, 45 L. ed. 619 (1901); *Missouri Pacific Railway v. Larabie Mills*, 211 U. S. 612, 621, 53 L. ed. 352 (1909); *Merchants Exchange v. Missouri*, 248 U. S. 365, 63 L. ed 300 (1919); *Atlantic Coast Line R. Co. v. Standard Oil Company*, 275 U. S. 258, 72 L. ed. 270 (1927); *Federal Compress Company v. McLean*, 291 U. S. 17, 78 L. ed. 622 (1934); *Chassanaiol v. Greenwood*, 291 U. S. 548, 78 L. ed 1104 (1934); *Clyde Mallory Lines v. Alabama*, 296 U. S. 261, 80 L. ed. 215; *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. ed. 1101 (1917); *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 80 L. ed. 138.

We have heretofore stated in this division of appellees' brief that Congress has not undertaken to deal with the subject matter to which the Georgia statute relates. In this connection it is to be noted that the Tobacco Inspection Act (U.S.C.A., Title 7, Section 511) passed by Congress after the instant suit was filed, clearly does not attempt to regulate the business of tobacco warehousemen, but only provides for the grading of producer's tobacco by government inspectors. Even if this Act were a regulation of the tobacco warehouse business, which obviously it is not, the Georgia statute would remain effective and valid since there is no conflict between the two statutes and the Federal act affords the grower no protection whatever against unreasonable charges by the warehouseman.

> "Congressional regulation of a business does not nullify state regulation of the same business, if the Federal act

does not cover the same field, or is consistent with the state legislation."

Hartford Accident & Indemnity Company v. Illinois, 298 U. S. 155, 80 L. ed. 1099.

3. CASES CITED BY APPELLANTS, DISCUSSED AND DISTINGUISHED.

In the conclusions of law filed by the majority of the statutory court in this case (Paragraph 4, R. 87) is set forth the contention of appellants with respect to the alleged invalidity of the act, as imposing a burden on interstate commerce. In this connection the Court said:

> "As we understand the contention of complainants it is, that because the acts of the warehousemen constitute one step in getting the tobacco to the manufacturer and such manufacturers all, or practically all, reside out of this state and it was known at the time the services were rendered by the warehousemen that the ultimate destination of the tobacco would be out of this state, that such services constituted a part of interstate commerce. We cannot agree with this contention. If sound, logically it would lead us to the conclusion that the very planting and harvesting of tobacco were parts of interstate commerce, for the reason that each of such acts was with the knowledge that all or practically all of the tobacco would ultimately move out of this State."

It is to be noted also that the minority of the statutory court reached the conclusion that the challenged act does not interfere with or burden interstate commerce.

The cases cited by appellants are easily distinguished in that the facts involved in such cases are entirely different from the facts involved in the instant case. They do not support appellants' contention. The cases in question will be briefly noted.

(a) *Covington & Cincinnati Bridge Company v. Kentucky*, 154 U. S. 204.

The *Covington Bridge Company case* involved the validity of an act of the legislature of Kentucky which made it unlawful for any person or corporation to charge, collect, or demand for a passage over the bridge spanning the Ohio River and connecting the State of Kentucky and the State of Ohio in excess of a certain amount named in the act. From the decision it appears that the bridge in question was constructed by and under cooperative acts passed by the legislature of the State of Kentucky on the one hand and the State of Ohio on the other, and confirmed by an act of Congress. The Kentucky law purporting to limit the charge which might be collected for passage over the bridge was attacked on the ground that it operated as an interference with interstate commerce and on the further ground that it impaired the obligation of a contract as contained in the original charter of the bridge company approved by both states. The act undertook to fix the price of tolls for merchandise and persons passing over this bridge from the State of Kentucky to the State of Ohio.

It is pointed out in the decision that the adjudications of the Court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; and third, those in which the action of Congress is exclusive and the states cannot interfere at all.

It was pointed out in the discussion that Congress has no power to interfere with police regulations relating exclusively to the internal trade of the state. The distinguishing features between the Kentucky Bridge case and this case are readily apparent. The Kentucky statute by its regulatory terms undertook to strike

at the very center of a current or flow of commerce passing from one state to another. The act imposes its regulation into the very current of interstate commerce after it is in motion and at a point where it is passing from one state to the other. We have no such analogous condition in this case. The force and effect of the regulatory statute here involved accomplishes its design and spends its force before the tobacco reaches the channel of interstate commerce. The challenged provisions of the statute are completely exercised before even a consummated sale is made.

(b) *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282.

In the *Bondurant case* was involved an action to recover damages for a breach of a contract for the sale and delivery of a crop of wheat. The plaintiff Dahnke-Walker Company was a Tennessee corporation engaged in operating a flour and feed mill at Union City, Tennessee. The defendant was a resident of Hickman, Kentucky, and had entered into a contract to sell to the plaintiff his crop of wheat at a stipulated price. The contract was made in Kentucky and the wheat was to be delivered and paid for there, but under the terms of the contract and the custom and practice theretofore observed over a period of years the delivery was to be on board the cars of a common carrier and the plaintiff intended to ship the wheat to its mill in Tennessee. Bondurant refused to comply with his contract and the suit was brought by the milling company against him for damages for a breach thereof. The defense interposed was that the plaintiff had not complied with the statute of Kentucky prescribing the conditions on which corporations of other states might do business in that state and for this reason it was contended that the contract was not enforcible. The plaintiff contended that the only business done in Kentucky consisted of

purchasing wheat and other grain in that state for immediate shipment to its Tennessée mill and then shipping the same there and that the contract in question was made in the course of this business and with the purpose of forwarding the wheat to the mill as soon as it was delivered on board the cars and that the transaction was in interstate commerce and that the statute of Kentucky invoked was invalid because in conflict with the commerce clause of the Federal Constitution.

At page 292 of 257 U. S., the court speaking through Mr. Justice Van Devanter, clearly points out the elements or features of this transaction which bring it within the concept of interstate commerce. He said:

> "It had been the practice of plaintiff to go into Kentucky to purchase grain to be transported to and used in its mill in Tennessee. On different occasions it had purchased from the defendant—at one time 13,000 bushels of corn. This contract was made in continuance of that practice, the plaintiff intending to forward the grain to its mill as soon as the delivery was made. In keeping with that purpose the delivery was to be on board the cars of a public carrier. Applying to these facts the principles before stated, we think the transaction was in interstate commerce. The state court, stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further fact that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. *We think the facts so neglected had a mtaerial bearing and should have been considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce.*" (Italics ours.)

From this statement it is clear that the Court considered the determining factor to be the fact that the grain in question, pursuant to and in continuance of a prior practice, was to be delivered on board the cars of a common carrier for shipment

to a mill in Tennessee. In the absence of this element, the Court further makes it clear, that the transaction would have been one falling within intrastate commerce.

(c) *Lemke v. The Farmers Grain Company*, 258 U. S. 50.

In the *Lemke case the* complainant was an owner of an elevator and a purchaser of grain bought in North Dakota to be shipped to and sold at Terminal markets in other states. The North Dakota act under attack in that case presented a comprehensive scheme to regulate the buying of grain. It was provided that purchases could be made by only those who hold licenses from the state, pay state charges for the same and act under a system of grading, inspecting and weighing as defined in the act. It was further provided that the grain in question could only be purchased subject to the power of the State Grain Inspector to determine the margin of profit which the buyer might realize on his purchase. The statute as is clearly disclosed in the decision was designed to relate to and regulate the business of those purchasers of grain in that state who bought with the intention of shipping to other states and the statute there involved even went so far as to limit and prescribe the amount of profit that the purchaser might make. Certainly, we can find no parallel elements in the statute here challenged. If the Georgia legislature should enact a law which purports to relate to those persons who purchase and ship tobacco to other states placing burdensome regulations upon the operation of their business and prescribing the profit that they might make, the *Lemke case* would be in point, but such is not the purpose or operative effect of the challenged statute. It does not purport to affect the business or operation of the purchaser or shipper of tobacco.

(d) *Shafer, etc. v. Farmers Grain Company, et al.*, 268 U. S. 189.

In *Shafer v. Farmers Grain Company, supra,* there was involved the question of the validity of the North Dakota grain grading act. The plaintiffs were owners and operators of country elevators within that state at which they bought wheat from farmers for shipment to markets in other states. The grain grading act under attack in that case had the same general purpose as the act involved in *Lemke v. Farmers Grain Company,* 258 U. S. 50. The act involved in the *Shafer case* purported to deal with and establish regulations affecting directly those plaintiffs owning and operating country elevators at which they bought wheat for shipment to markets in other states. The decision sets out rather completely the terms of the act. There is also disclosed in the opinion of the court the nature of the business affected and at page 200 of 268 U. S. appears a clear statement with reference to the general provisions of the act and its operative effect. The Court said:

> "Only by disregarding the nature of this business and neglecting important features of the act can it be said to affect interstate commerce only incidentally and remotely. That it is designed to reach and cover buying for interstate shipment is not only plain but conceded. To conform to recognized commercial practices such buying must be by grade, and it is so conceded. The Act prevents buying by grade, unless the buyer secures from the State a grading license for himself or his agent. The general practice is to buy and ship without separating the dockage from the wheat, the price paid carrying a right to both. The Act requires the buyer to separate the dockage and return it to the producer, unless it be distinctly valued and paid for. A failure to comply with this or any other requirement of the Act is made cause for revoking the grading license. It is practically essential that the buyers have and operate elevators as facilities for handling and loading the wheat. The act requires every such buyer to give to the State, if he buys on credit, a bond securing payment for all wheat so purchased; to keep a record of all wheat bought, show-

ing the grade given and price paid at his elevator and the grade fixed and price received at the terminal market; and to furnish such data to the State Supervisor when requested. The Act also intends and declares that the State Supervisor 'shall in a general way investigate and supervise the marketing' of the grain with a view of 'preventing' various things deemed unjust or fradulent, including 'unreasonable margins of profit' and 'confiscation of valuable dockage'; and, to the end that this and other provisions may be made effective, the Act invests him with authority to make and enforce such orders, rules and regulations as may be necessary to carry out all of its provisions."

The difference between the purpose and scope of the North Dakota grain grading act under review in the *Shafer case* and the Georgia statute under attack in this case appears at a glance. The North Dakota statute directly related to the purchaser of wheat for shipment to other states and imposed upon him regulations, burdensome in their nature. Like the act under review in the *Lemke case*, the State Supervisor was given broad power to supervise the marketing of grain and to prevent unreasonable margins of profit. We are sure it need not be repeated here that the Georgia act does not purport to deal with the purchaser of tobacco and imposes no restriction or regulation on either his buying, use or transportation of the commodity purchased.

In the *Shafer case* the Court states and recognizes as sound the rule that a state statute enacted for admissable state purposes and which affects interestate commerce only incidentally and remotely is not a prohibited state regulation in the sense of that clause (page 199, 268 U. S.).

The court also, through Mr. Justice Van Devanter, points out the elements in *Munn v. Illinois*, 94 U. S. 113, and *Cargill Company v. Minnesota*, 180 U. S. 452, and *Merchants Exchange*

v. Missouri, 248 U. S. 365, which distinguish them from the *Shafer case*. In connection with this matter he said:

> "In *Munn v. Illinois*, 94 U. S. 113, 123, 135, the question was whether, as respects an elevator devoted to storing grain for hire, the state could regulate the storage charge where part of the grain reached the elevator or was destined to reach it, through the channels of interstate commerce. The court held such regulation admissible because of the public character of the elevator and because interstate commerce was affected only *incidentally and remotely* (Italics ours). No restriction on buying or shipping was involved. In *Cargill Company v. Minnesota*, 180 U. S. 452, the court had before it a state statute, much of which had been pronounced unconstitutional by the state court. In sustaining a provision which remained, the court said, p. 470: 'The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state or the shipment out of the state of such grain as it purchased.' Plainly, the case is not in point here. In *Merchants Exchange v. Missouri*, 248 U. S. 365, the statute involved required that public weighers appointed for the purpose should do the weighing and issue weight certificates at elevators used for storing or transferring grain for hire, and prohibited any other person from issuing weight certificates at an elevator where a public weigher was stationed. Objection was made to the prohibition on the ground that as applied to grain received from or shipped to points without the State it burdened interstate commerce. Of course the objection was overruled, the statute being an admissible regulation of the business of conducting an elevator for hire, like the statute considered in *Munn v. Illinois*."

In the foregoing statement the Court in its interpretation of *Munn v. Illinois*, *Cargill Company v. Minnesota*, and *Merchants Exchange v. Missouri*, points out the rule which controls this case. Briefly stated, it is that the act here challenged places no restriction on buying or shipping and if, in fact, interstate com-

merce is affected at all, it is so affected only incidentally and remotely and not in such way or degree as contravenes the commerce clause of the Federal Constitution.

See also *United Leather Workers v. Herkert*, 265 U. S. 458, where the Court discusses both the *Bondurant case* and the *Lemke case* and points out the particular elements in the transaction therein involved which bring the facts of those cases within interstate commerce.

(e) *Oklahoma v. Kansas Natural Gas Company*, 211 U. S. 229.

The Court construed the Oklahoma act involved in this case as one having the obvious purpose and effect of preventing the transportation of natural gas, held by the court to be a commodity of intrastate and interstate commerce, from the State of Oklahoma to adjoining states, thus setting up a complete economic barrier between the states in the sale and distribution of natural gas in interstate commerce. Certainly, there is no such element to be found in Georgia statute. We have already pointed out the fact that the statute involved in the instant case places no restriction or limitation whatsoever on the purchase of tobacco or the transportation thereof from Georgia to any other state or foreign country. Neither in purpose nor effect does the Georgia statute create an economic barrier between the states or any condition of isolation of the State of Georgia.

(f) *Pennsylvania v. West Virginia*, 262 U. S. 553.

There was involved in this case the validity of a West Virginia statute, the obvious purpose and effect of which, as the Court held and pointed out, was to give preferential distribution of natural gas, a commodity of commerce, to the citizens of West Virginia, to the prejudice of the states of Pennsylvania and Ohio,

where an interstate business in such gas had been established, partly at the instance of the State of West Virginia. The act differs, not in character but only in degree, from the Oklahoma act involved in *Oklahoma v. Kansas Natural Gas case, supra.* The Georgia statute here under attack is so different in purpose, scope and effect that argument is not needed to demonstrate that the case cited does not control or support appellants' contention.

(g) *Binderup v. Pathe Exchange*, 263 U. S. 291.

The transaction under review in this case was held to be in interstate commerce. The elements of the transaction, however, as stated by the court were as follows:

> "The film contracts were between residents of different states and contemplated the leasing by one to the other of a commodity manufactured in one state and transported and to be transported to and used in another. . . . It consisted of manufacturing the commodity in one state, finding customers for it in other states, making contracts of lease with them, and transporting the commodity leased from the state of manufacture to the states of the lessee."

If the Georgia statute purported to affect, or as a matter of fact did affect, the purchaser of the tobacco who resides in another state and buys from persons in this state and transports the commodity so purchased to another state for manufacture and use therein, the cited case would be in point. But such is not the case. It is a far cry from the transaction under review in the Binderup case to the transactions which the Georgia statute affects, to wit, solely the transaction between the grower and the warehouseman. In the ordinary course of the business the warehouseman is not the purchaser of the tobacco, does not expect to transport it to another state, and is not interested in or concerned with the transportation of the product in question. How

then can the Binderup case support the contention that the Georgia statute burdens or interferes with interstate commerce?

(h) *Swift & Company v. United States*, 196 U. S. 375.

This suit was by the United States under the provisions of the Anti-Trust Act against a number of firms and individuals of different states and the bill charged a "combination of a dominant portion of dealers in fresh meat throughout the United States not to bid against each other in the livestock markets of the different states." The court construed the bill as charging "successive elements of a single connected scheme," the purport and design of which was to control and monopolize commerce in livestocks and meats in the United States. All defendants, whether operating wholly within a single state or not, were charged to be parties to such conspiracy and combination. The petition presented a situation of cattle being shipped from the far West to the stockyards at Kansas City, Omaha and other cities in the middle West and there sold for shipment to other states for feeding purposes or for slaughter and shipment of the meats therefrom to the Eastern states and foreign countries, for sale and distribution, and the purport of the bill was that defendants were endeavoring by combination and agreement to dominate, control and monopolize the movement of the livestock and meats from beginning to end. In this case the court for the first time developed and applied the concept of a "stream", "current" or "flow" of commerce and it was held to be immaterial that a "combination of this nature embraces restraint and monopoly of trade within a single state if it also embraces and is directed against commerce among the states." Under the conditions named it was held that "the effect of such a combination upon interstate commerce is direct and not accidental, secondary or remote." Surely there can be found in the Georgia statute involved in the instant case no such purpose or

design as appeared in the combination and agreement, plan or scheme of the defendants in the case cited. There must be a beginning or source before there can be a stream, current or flow of interstate commerce. We have heretofore pointed out that the Georgia statute spends its force wholly and completely on a local situation and that the force of its regulative provisions are exhausted before a consummated sale of the product. The case of *Swift & Company v. United States, supra,* cannot be controlling in this case because of the marked difference between the facts and conditions dealt with in the two cases.

(i) *Stafford v. Wallace*, 258 U. S. 495.

In this case there was involved the constitutional validity of the Packers and Stockyards Act of 1921. The scope and scheme of this act plainly was to deal with a situation developed in the case of *Swift & Company v. United States* and in effect the holding of the court was that if the courts could deal with such a situation after it had developed, Congress might interpose legislation to prevent its happening. The real purport of the decision in the Stafford case is set out by the Court itself in *United Leather Workers v. Herkert*, 265 U. S. 469, as follows:

> "The case of *Stafford v. Wallace*, 258 U. S. 495 and *Chicago Board of Trade v. Olson*, 262 U. S. 1, are also supposed in some way to sustain the view that a strike against the manufacture of commodities intended to be shipped in interstate commerce is a conspiracy against that commerce. What those cases decided was that when Congress found from investigation that more or less constant abusive practices and a course of business, usually only within state police cognizance, threatened to obstruct or unduly to burden the freedom of interstate commerce, it could by law institute supervision of such course of business in order to prevent the abuses having such effect. As said in *Stafford v. Wallace* (p. 520):

" 'The reasonable fear by Congress that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably and more or less constantly be used in conspiracies against interstate commerce or constitute a direct and undue burden on it, expressed in this remedial legislation, serves the same purpose as the intent charged in the Swift indictment to bring acts of a similar character into the current of interstate commerce for federal restraint.' "

It will be particularly noted that the Packers & Stockyards Act includes practices and courses of business "*usually only within state police cognizance*" and acts "*usually lawful and affecting only intrastate commerce when considered alone.*" But the court holds that these acts and practices may be subjected to control by Congress when they are more or less constant and will "probably and more or less constantly be used in conspiracies against interstate commerce or constitute a direct burden on it." Unless these conditions obtain of course Congress is without authority to interpose its regulatory power.

(j) *Tagg Brothers v. United States*, 280 U. S. 420.

This also is a case involving the Packers & Stockyards Act of 1921. In this case it was conceded that the transactions involved were in interstate commerce. The complainants conceded that they were engaged in such commerce at public stockyards and were subject to some regulation by Congress. Page 433 of 280 U. S. Their contention was that the order of the Secretary of Agriculture fixing the prices charged was invalid for the various reasons set out.

Neither the *Stafford case* nor the *Tagg Brothers case* can be considered as affecting the question involved in the instant case. Congress has not undertaken by any act of legislation to regulate or prescribe the charges to be made by tobacco warehousemen to growers for services rendered.

(k) *The Virginia Railway Company v. System Federation No. 40*, No. 324, October Term, 1936, decided March 29, 1937.

There was involved in this case an Act of Congress, the design and purpose of which is to prevent interruption of interstate commerce by strikes. Petitioner, the Railway Company, contended that certain of its employees, claiming rights under the Act, were not engaged in interstate commerce, in that the duties performed by them had no relation to interstate transportation. It was shown, however, that such employees were engaged in repair work on equipment used by the railway company in its transportation service, ninety-seven per centum of which is interstate. The Court, speaking through Mr. Justice Roberts, said:

> "Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation. The relation of the back shop to transportation is such that a strike of petitioner's employees there, quite apart from the likelihood of its spreading to the operating department, would subject petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of the transportation service. The cause is not remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible."

We cannot take this case as authority for holding the Georgia Act invalid as a burden on interstate commerce. Appellants are not engaged in the transportation business. Interruption of the flow of interstate commerce, from the enforcement of the act does not appear as a reality or reasonable possibility. The ruling of the Court in this case obviously is based upon the finding that a strike on the part of the back shop employees would subject the

a danger of interruption of its service *sub-*
; that "the cause is not remote from the
ion between them is *not tenuous*" and that
; cannot be regarded *as negligible*." (Ital-

It might be conceded therefore for the sake of the argument of this point that the transactions involved in this particular case are interstate in character. At the same time it must necessarily follow that the act is not invalid or unenforceable for the reason that the effect on interstate commerce from its enforcement cannot be held to be substantial. If it affects interstate commerce at all that effect is only negligible.

II.

IN THE EXERCISE OF ITS POLICE POWER THE STATE OF GEORGIA MAY FIX MAXIMUM CHARGES FOR TOBACCO WAREHOUSES.

One of the major contentions urged by appellants is that the General Assembly of Georgia was without power to enact the challenged statute. In this connection it is contended that the statute contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution.

1. THE POWER EXERCISED IS ONE PROPERLY FALLING WITHIN THE POLICE POWER AS THAT TERM HAS BEEN DEFINED AND APPLIED.

It would no doubt be without assistance to the Court for us to enter into a discussion of the nature, extent and scope of legislative power, concededly reserved to the states under the Federal Constitution and generally referred to as the police power. As helpful and comprehensive a statement perhaps as any is to be

found in the case of *Noble State Bank v. Haskell*, 219 U. S. 104, where Mr. Justice Holmes at page 111 said:

> "It may be said in a general way that the police power extends to all the great public needs. Camfield vs. United States, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

And with reference to the scope and extent of the police power of a state it is always to be remembered that with the widening of the scope of social control there must be and necessarily is a judicial extension of the concept of police power of the state. It is not a power that rests in the precedents of the past and the application of the principle should not and can not be denied merely because no precedent can be found for a statute precisely like the one under review.

Village of Euclid v. Amber Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303; *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 408.

From the decided cases it is well settled that the legislative power of a state, speaking generally, may be exercised in all matters that pertain to the public health, public safety, public morals, general welfare, public convenience and general prosperity.

2. THE BUSINESS OF TOBACCO WAREHOUSEMEN MAY BE REGULATED EVEN TO THE EXTENT OF PRESCRIBING MAXIMUM CHARGES FOR SERVICES RENDERED BECAUSE THE BUSINESS AS CONDUCTED IS AFFECTED WITH A PUBLIC INTEREST AND FOR ADEQUATE REASONS IS SUBJECT TO LEGISLATIVE CONTROL AND REGULATION.

Appellants here contend that the Act under attack contravenes the due process clause o f the Fourteenth Amendment for the rea-

son that in operation it restricts or limits liberty or freedom of contract. In view of the nature of the business conducted it is respectfully submitted that the contention is without merit.

The quesiton presented first came before the Court in the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77 (1877). In this case there was involved the question of the right of a state to fix by legislative enactment prices to be charged by warehousemen in the State of Illinois. The legislature of that state had enacted a law fixing the maximum charges to be made by grain warehousemen and the identical question presented in the case as stated by Mr. Chief Justice Waite at page 123 of 94 U. S. is

> "Whether the General Assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the state having not less than 100,000 inhabitants 'in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such manner that the identity of different lots or parcels can be accurately preserved.'"

It was claimed by the warehousemen that the act in question was repugnant to the Fourteenth Amendment to the Constitution of the United States. In approaching the question the Court first discussed the force and nature of the police power reserved to the states in the formation of the Union and after pointing out the source and nature of this power it proceeded to call attention to the fact that in the exercise of police power from time immemorial it had been customary in England and in this country from its colonization, to regulate by statutory enactment ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum charge to be made for

services rendered and accommodations furnished. The Court then states the principles upon which the power of regulation referred to rests, at page 126, saying:

> "Looking, then to the common law from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be juris privati only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris ,and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he ,in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." 94 U. S. 126.

The Court then states the nature of the businesses conducted by the plaintiffs. It was shown that the grain warehouses or elevators in Chicago were large structures holding from 300,000 to 1,000,000 bushels at a time and that the method of conducting the business of warehousemen had been in the process of development for approximately twenty years.

With reference to the warehouses and the nature of the business conducted the Court at page 131 said:

> "In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such 'as have been from year to year agreed upon and estab-

lished by the different elevators or warehouses in the City of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication.' Thus it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great states of the West' must pass on the way 'to four or five of the states on the seashore' may be a 'virtual' monopoly.

"Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper ,or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not. . . . Their business most certainly 'tends to a common charge, and is become a thing of public interest and use. . . . Certainly if any business can be clothed 'with a public interest, and cease to be juris privati only,' this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts." 94 U. S. 131, 132.

Following this observation, the Court calls attention to the fact that the people of Illinois in 1870 revising their constitution saw fit to make it the duty of the General Assembly to pass laws for the protection of producers, shippers and receivers of grain and produce and to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same to any elevator to which it might be consigned, etc. From this statement the Court, at pages 132 and 133 of 94 U. S., proceeds as follows:

"This indicates very clearly that during the twenty years in which this peculiar business has been assuming its present 'immense proportions,' something had occurred which led the whole body of the people to suppose that remedies

such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

Throughout its discussion the Court is careful to point out the fact that the principle dealt with and applied was not to be restricted by precedents of the past. In this connection the Court, at page 133 of 94 U. S., said:

"Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner."

We have quoted at length from the Court's opinion in this case because of the marked similarity between the situation and facts there dealt with and the facts presented by the record in the instant case.

Immediately following the decision of the Court in the case of *Munn v. Illinois, supra*, the cases of *Chicago B. & Q. R. Co. v. Cutts (Iowa)*, 94 U. S. 155; *Peik v. Chicago & Northwestern Ry. Co.*, 94 U. S. 164; Chicago, *Milwaukee & St. Paul R. Co. v. Ackley*, 94 U. S. 179; *Stone v. Wisconsin*, 94 U. S. 181; were all released by the Court, and following the rule established in the *Munn case*, the constitutional validity of state statutes fixing the maximum amount to be charged for the transportation of freight and passengers was upheld.

In point of time, the next case of importance decided by the Supreme Court of the United States is that of *Budd v. The State of New York* (1892), 143 U. S. 517, 36 L. ed. 247. In 1888 the Governor of the State of New York approved an act duly passed by the legislature of said state regulating the fees and charges for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in said state. The act provided for a maximum charge for the service to be rendered according to a schedule fixed in the act. A violation of the act was made penal. Budd was indicted for a violation of the act, tried and convicted. An appeal to the state courts was denied and finally his case reached the Supreme Court of the United States, with two other cases involving the same legal question. After the historical and jurisdictional facts connected with the cases were stated by the Court, it proceeded in these words:

> "The main question involved in these cases is whether this court will adhere to its decision in *Munn v. Illinois*, 94 U. S. 113." 143 U. S., p. 528.

Thereupon, not only the *Munn case*, but other cases decided by the Court since the decision in the *Munn case* and several state cases including the Railroad Rate Cases appearing in 94 U. S.

were reviewed and carefully considered. After such review and consideration of the cases, the Court, at page 539, said:

> "It is thus apparent that this court has adhered to the decision in *Munn v. Illinois* and to the doctrine announced in the opinion of the court in that case; and those doctrines have since been repeatedly enforced in the decisions of the courts of the State."

And again, at page 544, the Court said:

> "We must regard the principle maintained in *Munn v. Illinois* as firmly established; and we think it covers the present cases, in respect to the charge for elevating, receiving, weighing and discharging the grain, as well as in respect to the charge for trimming and shoveling to the leg of the elevator when loading and trimming the cargo when loaded."

Finally the Court, at page 548, holds:

> "In the cases before us, the records do not show that the charges fixed by the statute are unreasonable or that property has been taken without due process of law, or that there has been any denial of the equal protection of the law; even if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable."

By the decision in this case the right of a legislature to declare what is reasonable compensation for the service of a person exercising a public employment, or to fix a maximum beyond which a charge made would be held unreasonable, is clearly established.

The next case of importance is that of *Norman Brass v. Stoeser* (N. D.), (1894) 153 U. S. 391, 38 L. Ed. 757.

This case involved a statute of the State of North Dakota ap-

proved March 7, 1891, regulating grain warehouses and the weighing and handling of grain in such houses in that state. By the terms of the act the maximum amount which a warehouseman might charge for services rendered by him in the storing, weighing and handling of grain was fixed according to a schedule therein set out. It was contended that the act was repugnant to the Fourteenth Amendment to the Constitution of the United States in that, as it was contended, the effect of the act was to deprive the warehousemen of their property without due process of law and denied to them the equal protection of the law. In this case the warehousemen undertook to distinguish their case from the cases of Munn v. Illinois and Budd v. New York, supra, it being contended that a distinction should be made by the Court on the ground that, whereas the statute of Illinois as construed in the Munn case and the statute of the State of New York, as construed in the Budd case were designed to apply to thickly or densely populated centers, the North Dakota act applied to the state as a whole and that that state was sparsely settled and comprised a large agricultural district. The plaintiff also undertook to distinguish his case from the other cases on the ground that his warehouse was designed primarily to accommodate his own individual business and that his service to the public was incidental. The Court, however, would allow no such distinctions.

Concluding its opinion, the Court, through Mr. Justice Shiras, said:

> "The allegations and arguments of the plaintiff in error have failed to satisfy us that any solid distinction can be found between the cases in which these questions have been heretofore determined by this court and the present one." 153 U. S. 406.

The next important case decided by the Court is *German Alliance Insurance Company v. Lewis* (*Kan.*), 233 U. S. 389 (1914).

In 1909 the legislature of the State of Kansas passed an act regulating the fire insurance business and providing for the control of rates of premiums thereon. The German Alliance Insurance Company brought suit attacking the constitutional validity of this act on the ground that it was repugnant to the Fourteenth Amendment of the Constitution of the United States.

The insurance company thought that it presented a ground of substantial difference between the facts of its case and those dealt with in the cases of *Munn v. Illinois, Budd v. New York* and *Brass v. North Dakota, supra.* It contended that the classes of businesses dealt with in those cases were entirely different in their nature from the business of writing fire insurance. It was asserted that the business of fire insurance is a private business and therefore no constitutional power is vested in the state to fix the rates and charges for services rendered by it. The contention, in the main, of the insurance company, as stated by the Court, at page 405 of 233 U. S., is as follows:

> "The basic contention is that the business of insurance is a natural right, receiving no privilege from the state, is voluntarily entered into, cannot be compelled nor can any of its exercises be compelled; that it concerns personal contracts of indemnity against certain contingencies merely. Whether such contracts shall be made at all, it is contended, is a matter of private negotiation and agreement, and necessarily there must be freedom in fixing their terms. And 'where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist.' Many elements, it is urged, determine the extending or rejection of insurance. The hazards are relative and depend upon many circumstances upon which there may be different judgments, and there are personal considerations as well—'moral hazards' as they are called."

The Court disposed of this contention of the insurance company as follows:

> "The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use, which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (*Noble State Bank vs. Haskell*, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated." 233 U. S. 407.

Further referring to the effort on the part of the insurance company to distinguish its case from *Munn v. Illinois* and the other cases referred to, the Court said:

> "The principle was expressed, as to property and the instance of its application was to property, but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest." 233 U. S. 408.

Thus it will be seen that the Court in the decision of the *German Alliance Insurance Company case* extended the principle theretofore announced in the *Munn* and *Budd cases* and held that a public interest can exist in a business, such as insurance, as distinguished from a public use of property and can be the basis of power of the legislature to regulate personal contracts which are separate and apart, and disconnected from property or its use.

In this case also Mr. Justice McKenna had occasion to refer to *Brass v. Stoeser, supra*, and to point out the fact that the Court

in the decision of the Brass case advanced a step further in the application of the police power of a state than it had gone in the *Munn* and *Budd cases*.

The next case of importance is that of *Nebbia v. The State of New York*, 291 U. S. 502, 54 S. Ct. 505, decided by the Court March 5, 1934. The legislature of the State of New York in 1933 established a milk control board with power to fix minimum and maximum retail prices to be charged by stores to consumers for consumption off the premises where sold. The board of control thus created conducted a hearing and fixed both the price at which milk might be bought and the price at which it might be sold. A provision of the statute is to the effect that it "shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price" as shall be fixed by the board of milk control. The appellant attacked the act on the ground that it denied to him due process secured by the Fourteenth Amendment. It was particularly contended that the milk industry was not a public utility and that no monopoly or monopolistic practice had been developed in the operation of the milk industry in the state and that particularly did the legislature exceed its power and authority when it undertook to fix or provide for the fixing of the actual price at which milk might be sold and purchased. In its approach to the decision of the point involved, the Court calls attention to the fact that the milk industry in the State of New York was a paramount industry and had "been progressively subjected to a large measure of control."

Then coming directly to the question involved in the case and referring to the contentions of complainant, the court said:

> "But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate reg-

ulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. . . . The argument runs that the public control of rates or prices is per se unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake or one whose owner relies upon a public grant or franchise for the right to conduct the business or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and therefore, not being affected with a public interest, its charges may not be controlled by the State. Upon the soundness of this contention, the appellant's case against the statute depends." 291 U. S. 531; 54 S. Ct. 513.

In its further approach to a decision of the question involved, the court concedes that the dairy industry is not a public utility in the accepted sense of that term and that in the particular case involved, no suggestion of any monopoly or monopolistic tendency or practice appears and that those engaged in such business are in no way dependent upon public grants or franchises for the right or privilege of conducting their activities. The court then said:

"But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is

something peculiarly sacrosanct about the price one may charge for what he makes or sells and that however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to business affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a misconception." 291 U. S. 531, 532; 54 S. Ct. 514.

The Court, discussing the scope of the ruling in the Munn case, further said:

"It is true that the court cited a statement from Lord Hale's De Portibus Maris to the effect that when private property is 'affected with a public interest, it ceases to be juris privati only;' but the court proceeded at once to define what it understood by the expression, saying: 'Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.' Page 126 of 94 U. S. Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power;' and it is plain that nothing more was intended by the expression." 291 U. S. 532, 533; 54 S. Ct. 514.

Further touching the import or meaning of the phrase "affected with a public interest" as used in the Munn case, the Court said:

"The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue." 291 U. S. 534; 54 S. Ct. 514.

Further, proceeding to the statement of the fundamental and controlling concept in such cases, the court said:

> "The touchstone of public interest in any business, its practices and charges, clearly is not the enjoyment of any franchise from the state, Munn v. Illinois, supra. Nor is it the enjoyment of a monopoly; for in Brass v. North Dakota, 153 U. S. 391, a similar control of prices of grain elevators was upheld in spite of overwhelming and uncontradicted proof that about 600 grain elevators existed along the line of the Great Northern Railroad in North Dakota; that at the very station where the defendant's elevator was located two others operated; and that the business was keenly competitive throughout the state.
>
> "In German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L.R.A. 1915C, 1189, a statute fixing the amount of premiums for fire insurance was held not to deny due process. Though the business of the insurers depended on no franchise or grant from the state, and there was no threat of monopoly, two factors rendered the regulation reasonable. These were the almost universal need of insurance protection and the fact that while the insurers competed for the business, they all fixed their premiums for similar risks according to an agreed schedule of rates." 291 U. S. 534 and 535.

In connection with its discussion, the Court at this point refers to other decided cases where statutes regulating prices of service and commodities have been sustained. Among the cases so cited is that of *Griffith v. Conn.*, 218 U. S. 563, where the price or the amount exacted for the use of money was fixed; also *O'Gorman and Young v. Hartford Insurance Co.* 282 U. S. 251, where a statute regulating the amount of compensation to agents of insurance companies is sustained; also *Frisbee v. United States*, 157 U. S. 160, and other cases where the amount to be charged by attorneys for prosecuting certain classes of

claims was fixed and sustained by the court; also *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, where the charges made by stockyards corporations was fixed and regulated in the public interest; also *Stephenson v. Binford*, 287 U. S. 251, 274, where a statute fixing the amount to be charged by a private carrier was sustained.

After citing the cases aforesaid, the Court proceeds in the following language:

> "It is clear that there is no closed class or category of business affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or as discriminatory. *Wolff Packing Company v. Court of Industrial Relations*, Kansas, 262 U. S. 522. The phrase, 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reasons, is subject to control for the public good." 291 U. S. 536, 537.

The statute of the State of New York was sutained as a valid exercise of the police power.

The four cases cited and discussed give a complete picture of the development of the law with reference to the subject at hand as declared by the Court. There were three elements shown to be present in the Munn case justifying the state legislature in fixing the maximum prices which operators of grain elevators might charge. These were (a) the fact that the grain warehousemen had reached and were perpetuating an agreement among themselves with reference to the prices to be charged; (b) by reason of their position, organization and the nature of the industry they held a virtual monopoly on the grain warehouse business

in the section of the country where they were operating; and (c) a large portion of the grain producing west was dependent upon them for the facilities and services which they furnished. The Budd case did not extend the scope of the rule announced in the Munn case. As heretofore pointed out the main effort of counsel for Budd in that case before the Supreme Court was to convince the Court that the Munn ruling was unsound and overrule it. In this, however, they failed and the Munn case was followed as sound and the settled law of the land. In the Brass case the scope of the rule announced in the Munn case was extended for as was pointed out by Mr. Justice McKenna in the case of *German-Alliance Insurance Company vs. Lewis*, it did not appear in this case that the warehousemen had either an actual or virtual monopoly of the business. Notwithstanding this fact and although the element of monopoly was not present, the Munn case was followed as the established law applicable to the facts in that case.

In the *German Alliance Insurance Company case*, there is still a further extension of the principle announced in the Munn case as the opinion in that case clearly discloses. The features developed in that case and which were held to justify statutory regulation of prices or amounts of premiums on the insurance as Mr. Justice Roberts points out in the *Nebbia case*, were only two, to wit, the universal need of insurance and the fact that the insurance companies by a common understanding among themselves had fixed and were observing a common charge. In the Nebbia case the scope of the rule is extended still further. In this case it was conceded that the business under discussion, to wit the dairy business, is not a public utility in the sense that that term has usually been accepted and it was further conceded that there was in the case no suggestion of any monopoly or monopolistic practice. It was further conceded that it was not a business dependent

upon any public grant or franchise, yet nevertheless it was held that the order of the milk board promulgated under the provisions of the statute fixing both the minimum and maximum prices of milk was valid. Mr. Justice Roberts ably discusses and analyzes many, if not all, of the cases theretofore decided by the Court touching the question at hand and the ultimate effect of the decision is to make the question of legislative power to prescribe a maximum price for any commodity or service to turn upon whether there are adequate reasons in the public interest for so doing. At page 536 of 291 U. S. it is said:

> "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."

By a majority, the statutory court, in this case, was content to rest its judgment on the *Nebbia case*. It said:

> "The Supreme Court has in the recent case of *Nebbia v. New York*, 291 U. S. 502, presented such an able and exhaustive discussion on both sides of the question as to when an occupation is so 'affected with a public interest' or 'clothed with a public use' as to be subject to legislative control to the extent of price fixing that any attempt at clarification by us would be presumption. Under that decision the statute under attack is clearly within the scope of legislative power." (Paragraph 3 of Conclusions of Law, R. 87.)

The conclusion of the Court is fully justified.

In addition to the cases we have cited above, there is a group of three cases which should be considered together and which will no doubt be helpful to the Court. They are *Frost v. Corporation Commission*, 278 U. S. 515, (1929); *Chickasha Cotton Oil Company v. Cotton County Gin Co.*, 40 F. (2d) 846 (1930); *New State Ice Company v. Liebman*, 285 U. S. 262 (1932).

By a statute of the State of Oklahoma, cotton gins in that state were declared to be public utilities and the business operated by

them affected with a public interest. A maximum charge for service rendered was provided for. The *Frost case*, while dealing primarily with the question of the nature of a franchise granted to a company under the provisions of that law assumed the validity of the act insofar as the statute declared that the ginning of cotton was so affected with a public interest that the maximum charges for services might be prescribed. The question of the constitutionality of the act came before the Circuit Court of Appeals for the Tenth Circuit in the case of *Chickasha Cotton Oil Company v. Cotton County Gin Company, supra.* The power of the legislature to enact such law was challenged as infringing the due process clause of the Fourteenth Amendment to the Constitution of the United States. All three of the circuit judges, while writing separate opinions, reached the conclusion that the business was affected with a public interest and the charges for services rendered by cotton gins were subject to statutory regulation. In the case of *New State Ice Company v. Liebman* both the *Frost case* and the *Chickasha Cotton Oil Company case* were referred to with approval, although it was pointed out that the facts in those cases were to be distinguished from the facts involved in the Liebman case. In its discussion the Court points out clearly the grounds upon which the Circuit Court of Appeals was justified in the *Chickasha Cotton Oil Company case* in holding the business there involved to be affected with a public interest and the charges for services rendered subject to statutory regulation. These grounds as set forth on page 276 of 285 U. S. are:

1. Cotton production is one of the chief industries of the State of Oklahoma and is of such paramount importance as to justify the assertion that the general welfare and prosperity of the State in a large and real sense depend upon its maintenance.

2. The cotton gin bears the same relation to the cotton grower that the old grist mill did to the grower of wheat.

3. The service is a necessary one with which ordinarily the grower cannot dispense.

4. The grower is compelled to resort for such service to the establishment which operates in his locality.

5. The grower is so dependent upon the gin that he faces the practical danger of being placed at the mercy of the operator with respect to exorbitant charges and arbitrary control.

6. The relation between the grower and those engaged in furnishing the service is a peculiarly close one in respect to an industry of vital concern to the general public.

One quickly discovers, in the tobacco warehouse business and the manner of conducting it, every element or factor, which the Court points out as justifying a holding that the cotton gin as operated in the State of Oklahoma is "affected with a public interest."

Furthermore, it has generally been considered where tobacco warehouses have operated that their method of operation is such as to require statutory control. As early as the year 1921 the General Assembly of Georgia, recognizing the fact that the business of the tobacco warehouseman is affected with a public interest enacted a regulatory statute by the terms of which proprietors of bright leaf tobacco warehouses were required, at stated intervals, to furnish the Commissioner of Agriculture information with reference to their respective operations. Acts 1921, page 210; Code of 1933, Sections 111-201 to 111-206. Further recognizing the fact that the business of warehousemen is affected with a public interest, in the year 1927 the Legislature of Georgia went so far as to exempt auctioneers at these warehouses from payment of the special tax of $100.00 required of other auctioneers. Georgia Code of 1933, Section 92-1901.

For many years there has been in force in the State of Virginia a statute regulating the sale of tobacco in the warehouses in that state and it goes to the extent of fixing a maximum fee or charge for services rendered. Virginia Code of 1924, Sections 1376 to 1381. Several years ago, South Carolina also adopted a regulatory statute by the terms of which the maximum prices, charges and fees to be exacted by warehousemen for services rendered are definitely fixed. South Carolina Code of 1932, Section 7197. The Georgia statute here under attack is almost a verbatim copy of the South Carolina statute.

Likewise, the State of North Carolina for a long number of years has had in force a statute prescribing maximum charges which tobacco warehousemen may make in the operation of their businesses. Consolidated Statutes of North Carolina, Section 51-24. In the case of *Gray v. Central Warehouse Co.* (N. C. Supreme Court), 106 S. E. 657, (1921), Mr. Chief Justice Clark, speaking for the Court, said:

> "As far back as the history of the state extends, the business of tobacco warehouses has been, if not a public duty, always affected with a public use. To the fullest extent, therefore, regulation and control by the public has been recognized and enforced in this state."

In this case, further discussing the history of regulation in the State of North Carolina, the court said:

> "The entire history of the state and the statutes on this subject as well as our present statutes place the regulation of tobacco warehouses, not under private control, as defendants have assumed ,in this case, but under the control of the public authority."

Another interesting case decided by the Supreme Court of Kentucky, a tobacco growing state, is *Parnell v. Louisville Tobacco Warehouse*, 113 Ky, 630.

The Supreme Court of Kentucky in this case was speaking with reference to an act of the legislature of that state approved in 1892 regulating the operation of tobacco warehouses even to the extent of fixing the prices charged for services rendered by such houses. Among other things the court said:

> "The right of a state to prescribe reasonable rates is unquestionable. The only question is whether the rates prescribed are so unreasonable as to be in their nature confiscatory. The rule is that the judiciary will not interfere with the collection of the rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use, without such compensation as, under all the circumstances, is just both to the owners and to the public; that is, judicial interference should never occur unless the case presents clearly and beyond all doubt such flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rate prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

When the history of regulatory statutes in the states where bright leaf tobacco is grown and sold in public warehouses, is noted, an observation of Mr. Justice McKenna in *German Alliance Insurance Company v. Lewis*, 233 U. S. 412. becomes significant. There it had been pointed out that a large number of states had adopted regulatory statutes of one kind or another affecting the business of insurance and after referring to this fact the learned Justice said:

> "Those regulations exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulations. A concepiton so general cannot be without cause. The universal

sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis." 233 U. S. 412.

And so it is here. The fact that the several states where bright leaf tobacco is grown and sold, as the industry has developed, have enacted regulatory statutes even to the point of fixing prices cannot be accidental. There must be some basis for the existence of a legislative policy so general. Most probably Mr. Chief Justice Clark in the case of *Gray v. Central Warehouse Co., supra*, discovered and stated the principal cause or basis for all of these regulatory statutes in these words:

> "In fact, there is no subject in which the protection of the producers against extortions and combinations to reduce prices is more important."

Indeed, statutory regulation of price is usually directed toward the prevention of fraud and exorbitant demands either of buyers or sellers and is always justified wherever a situation or combination of circumstances exists which materially restrict the regulative force of competition so that the buyer or seller, as the case may be, is placed at a disadvantage in the bargaining struggle; where a full level of equality of choice as between the buyer and seller does not exist; where from the nature of the business or otherwise the buyer or seller, as the case may be, occupies a position which may be described as necessitous; and where from the circumstances of the case the strategic position of one group is such as to enable it to impose its will in matters of price upon those who sell or buy and who in the ordinary course of the particular business must deal with the person occupying the strategic position. In such cases, "self interest is not permitted to invoke constitutional protection at the expense of the public." See opinion of Mr. Justice Stone, *Tyson & Bro. v. Banton*, 273 U. S. 451.

See also *West Coast Hotel Co. v. Parrish*, No. 293 Oct. Term, 1936, decided March 29, 1937.

Obviously one of the objectives which the Georgia Legislature intended to accomplish by the enactment of the statute complained of was to prevent imposition and excessive charges to the injury of a large class of tobacco growers occupying necessitous circumstances with respect to the warehouseman. This is no doubt the main object of the law and certainly it cannot be said with reason that the act has no reasonable or substantial relation to the object or purpose. The court however is not particularly concerned with the particular object which the legislative branch of the government had in mind at the time the challenged statute was enacted. It is not concerned with the question of motive or of wisdom or discretion. It is concerned here only with the question of power and if the General Assembly of Georgia is vested with power to enact such a law under any circumstances that might exist we must accept the act as a valid exercise of its prerogative.

> "If no state of circumstances could exist to justify such a statute, then we may declare this one void because in excess of the legislative power of a state. But if it could, we must presumed it did. Of the propriety of legislative interference within the scope of legislative power the legislature is the exclusive judge." *Munn v. Illinois*, 94 U. S. 132, 133, 24 L. Ed. 86).

Attention is also called to the case of *Rast v. Van Deman & Lewis*, 240 U. S. 365, 366, where it is said:

> "And it is not required that we should be sure as to the precise reasons for such judgment or that we should certainly know them or be convinced of the wisdom of the legislation. *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 126, 127. See also *Munn v. Illinois*, 94 U. S. 113." *Cotting v.*

Kansas City Stockyards, 183 U. S. 79; *McLean v. Arkansas*, 211 U. S. 539; *Noble State Bank v. Haskell*, 219 U. S. 104; *O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U. S. 251. *West Coast Hotel Co. v. Parrish*, ... U. S. ....., No. 293 Oct. Term, 1936, Decided March 29, 1937.

Cases may, of course, be found in which this Court has held that attempted statutory regulation, as to particular facts, circumstances or businesses was in excess of the power which legislative bodies might exercise and, for that reason, contravene the due process of law clause of the Federal Constitution. But such cases may be easily distinguished from the case here under review.

Tobacco production is one of the chief agricultural industries of the state. It is of such paramount importance as to justify the assertion that the general welfare and prosperity of the people of a large portion of the state, in a real sense, depends upon its maintenance. See paragraph 5 Court's finding, R. 77-78, and to which exceptions are not taken. In the normal and customary course of marketing in Georgia, tobacco can only be sold in warehouses located in the Georgia Tobacco Belt. See paragraph 9 Court's finding, R. 80, and to which exception is not taken. In 1935 there were forty-five warehouses in the Georgia Tobacco Belt available to the growers for the sale of their tobacco crop. These forty-five warehouses were operated by the forty-four complainants filing the original bill in this case. There is no warehouseman in the Belt who did not join in the suit. Such was the situation in 1934 and in March, 1935, when the Act was passed. And while exception is taken to the Court's finding (part of paragraph 10, R. 80) that prior to 1927 the warehousemen in Georgia, for many years, if not from the beginning of the industry, had maintained and exacted from sellers of tobacco a uniform schedule of charges, substantially, if not

identically, the same as the schedule fixed by the Act of 1935, it is not denied, but in fact is conceded, that the warehousemen in 1934, throughout the Belt, had maintained a uniform schedule of charges to the growers for services rendered and expected to do so in 1935. See original bill, paragraph 8, subdivision D, R. 9-10. Among the warehousemen there had been organized The Georgia Tobacco Warehousemen's Association, and all appellants were and are members of said Association. The growers were not eligible for membership. The Association, with the buyers, determine the date when markets open and substantially the date on which the markets close. The Association undertakes to deal with such practices as affect the interests of the members thereof and adopt regulatory rules to be observed by such members. A new member is admitted when he becomes identified with the tobacco warehouse business in Georgia, and promises to be governed in his charges by the schedule of fees then in effect throughout the State of Georgia fixed by the Association. The matter of fees and charges to the growers was discussed at a meeting of the Association in 1934. Obviously a suggestion was made in such meeting of the Association that fees and charges be reduced though it does not appear whether the suggestion came from within or without the Association. "After discussion of the matter it was decided that no change should be made in charges, but that if any were made it would be higher instead of lower." Thus indicating concerted action on the part of the members of the Association to maintain a uniform level of fees and charges. See Paragraph 20 Court's finding, R. 85-86, and note that the recitals of fact as set out above in this finding are not excepted to.

So much being admitted or conceded, it necessarily follows that the facilities and service offered by the warehousemen can not, in ordinary and normal course of marketing, be dispensed with by the growers; that the growers are, for such service, com-

pelled to resort to the warehouses in their respective localities; that the tobacco warehouse bears the same relation to the tobacco grower that the old grist mill did to the wheat grower; that the tobacco grower, is so dependent upon the tobacco warehousemen that he faces a practical danger of being placed at their mercy with respect to exorbitant charges and arbitrary control; that the relation between the grower and those engaged in furnishing the service is a peculiarly close one; that the warehousemen, by reason of their common agreement or understanding and concert of action, occupy a position of advantage with respect to the marketing bargain; that they enjoy what is referred to in *Munn v. Illinois*, supra, as "a virtual monopoly"; that they have "an unduly coercive control over prices charged", unless regulated by law.

But appellants contend that the rule announced and applied in the cases cited and discussed in this division of appellees' brief are without force or application to them, for the reason, as they say, that the tobacco warehouse business in Georgia is a wide open field, and that any person is at liberty to open and operate a tobacco warehouse, provided only he can finance the venture and secure skilled employees.

The asserted distinction is not real. The same factor appeared in the situation dealt with in all the cases upon which we rely. Any one possessing the requisite capital could have entered the grain warehouse business in Chicago in competition with Munn and Scott or could have entered the grain elevator business in New York in competition with Budd and his associates, or could have entered the grain warehouse business in North Dakota in competition with Brass and others then operating grain warehouses, and certainly there was no reason why any person possessing the requisite capital could not have entered the insurance business in Kansas at the time the statute involved in *German*

Alliance Insurance Company v. Lewis was enacted. And in *Nebbia v. New York* it was expressly conceded that neither a monopoly nor a monopolistic tendency was involved.

We are not prepared to admit, therefore, that either a monopoly or a monopolistic tendency is a requisite element or factor upon which legislative power to prescribe maximum prices is conditioned. However that may be, one thing here is certain; If appellants were not, at the time the Georgia Act was passed, maintaining an air-tight monopoly in the tobacco warehouse business in Georgia and if, since that time, they have not been maintaining such monopoly it is not due to any act, purpose, or intent on their part or on the part of either of them. They have done all they could to accomplish such end. And to say that outsiders might have broken the monopoly which they formed certainly is not a satisfactory answer for them to make.

III.

THE ACT IS NOT, IN EFFECT, UNREASONABLE, ARBITRARY OR CAPRICIOUS.

We omit for the present a discussion of the Act from the standpoint of the revenue permitted thereby and the contention of appellants that the Act is unreasonable and arbitrary on that ground. That question is reserved for a separate division of this brief.

Here we wish to note other contention of appellants to the effect that the Act is unreasonable arbitrary, and capricious and particularly the grounds upon which such contentions are based. For instance, it is charged in the Bill and asserted in appellants' brief that the challenged Act is unreasonable, arbitrary and capricious in that there was no investigation of the subject of tobacco marketing in Georgia by the legislature prior to the enact-

ment of the statute; that the people, or legislative body, who passed the purported Act, knew little of it; that there was no demand for regulation by the tobacco growers; that the Act was not passed in response to an emergency. See R. 39-42 and appellants' brief, point D.

It will easily be seen that these questions are all questions or issues which address themselves to the legislative body and are concluded by the proper enactment and enrollment of the law.

In *Clements, et. al. v. Powell, Tax Collector*, 155 Ga. 278, the Supreme Court of Georgia, speaking with reference to a duly enrolled Act of the General Assembly, said:

> "We are not at liberty to inquire into the motives of the legislature. Ex Parte McCardle, 7 Wall. 504. The courts will conclusively presume that no general laws are ever passed either through want of information on the part of the legislature, or because it was misled by false representations of interested parties. 8 Cyc. 304."

In *Dorsey, Governor, v. Wright*, 150 Ga. 321, the Supreme Court of Georgia said:

> "A duly enrolled Act, properly authenticated by the regular presiding officers of both houses of the General Assembly, approved by the Governor, and deposited with the Secretary of State, as an existing law, will be conclusively presumed to have been enacted in accordance with constitutional requirements."

See also *Atlantic Coast Line Railroad Co. v. The State*, 135 Ga. 545.

While the cases cited are from a state court, the doctrine announced and declared is in accordance with the current of authority both state and federal.

In *Chesapeake & Potomac Telephone Co. v. Manning*, 186 U. S. 238, 46 L. Ed. 1144, 22 S. Ct. 881, the Court, at page 245, said:

> "But it is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action."

In *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. Ed. 238, 31 S. Ct. 259, the Court, at page 569, said:

> "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

In *Northern Securities Company v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436, the Court, at page 350, said

> "So long as Congress keeps within the limits of its authority as defined by the constitution, infringing no rights recognized or secured by that instrument, its regulation of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all."

In *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755, 37 S. Ct. 298, the Court, at page 358 said:

"While it is a truism to say that the duty to enforce the constitution is paramount and abiding, it is also true that the very highest of judicial duties is to give effect to the legislative will, and in doing so to scrupulously abstain from permitting subjects which are exclusively within the field of legislative discretion to influence our opinion or to control judgment."

Another contention put forth by appellants is that no board or other body was created to ascertain the facts relevant to the business of tobacco warehousing and that no hearing was given by the legislature to the interested parties prior to the enactment of the law and it is urged that the challenged Act is unreasonable, arbitrary and capricious for this reason. See allegations of original Bill, R. 39, and brief of appellants, point D.

The contention is completely answered in *Dayton-Goose Creek Railroad Company v. United States*, 263 U. S. 456, 486. In this case the Court had before it for consideration the recapture clause of the Transportation Act of 1920, and it was contended by the railway company that that particular portion of the Act was unconstitutional for the reason that no board or commission was created to investigate and make findings of fact with reference to the reasonableness of the net rate allowed to the carrier. The Court disposed of the contention as follows:

"It is further objected that no opportunity is given under Section 15A for a judicial hearing as to whether the return fixed is a fair return. The steps prescribed in the act constitute a direct and indirect legislative fixing of rates. No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such an inquiry exists under Section 208 and 211 of the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution. *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287."

In the *Ohio Valley Water Company case* cited, the Court, at page 289 of 253 U. S., in effect, held and stated that the requisite of due process on any issue as to confiscation is met where the state provides a fair opportunity of submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts. See also *Budd v New York*, 143 U. S. 517, 546.

The answer made to complainants' contention in the *Dayton-Goose Creek case* and the *Budd case* is a proper and sufficient answer to appellants' contention here. The Georgia Act directly prescribes the rates to be charged. The general laws and statutes of the State of Georgia provide opportunity for submitting any issue of confiscation or arbitrariness to a court of equity for determination upon its own independent judgment as to both law and facts.

In the State of Georgia the Superior Courts are courts of original jurisdiction and by Section 37-101 of Georgia Code of 1933, it is provided.

> "All equity jurisdiction shall be vested in the Superior Courts of the several counties."

By Section 37-102 of said Code it is provided:

> "Equity jurisdiction is established and allowed for the protection and relief of parties, where, from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong or relieving from injuries done."

By Section 37-124 of said Code, it is provided:

> "Generally, equity jurisprudence embraces the same matters of jurisdiction and modes of remedy as were allowed and practiced in England."

By Section 55-101 of said Code, it is provided:

> "Equity, by a writ of injunction, may restrain proceedings in another or the same court, or a threatened or existing tort, or any other act of a private individual or corporation which is illegal or contrary to equity and good conscience and for which no adequate remedy is provided at law."

See Title 37, Georgia Code of 1933, which deals generally with the subject of equity jurisprudence and remedies as allowed in the State of Georgia.

Besides, the constitutionality of the act might, under the general laws and statutes of the state, be presented and determined in any prosecution or proceeding had or brought with reference to the enforcement of the act. The foregoing references are given and statements made to the end that the Court may see that the State of Georgia fully protects and provides a remedy to any person aggrieved or injured by the enforcement of an act that is unconstitutional and, certainly, it will not be held that every person or citizen who may be affected directly or indirectly by a legislative enactment is entitled to an elaborate hearing before either a legislative committee or a board created to conduct an investigation of fact before the legislature may enact a law or that, in the absence of such hearing, courts will strike down a general law duly enacted and enrolled as being arbitrary, unreasonable and capricious. Further, certainly it will not be expected that a court will undertake to determine whether or not the law was enacted in response to an emergency or whether there was adequate investigation on the part of the legislature before its enactment or whether a more appropriate legislative procedure or workable plan or scheme could have been found in the creation of a board or public body than the direct legislative enactment. These are all matters addressing themselves to

the discretion of the General Assembly. It was for the legislature itself to make the choice of means by which its objective was to be secured.

Virginia Railway System v. System Federation No. 40, — U. S.....,, No. 324 October Term, 1936.

Such determination is without the function or jurisdiction of the courts.

Still another contention made by appellants is that the statute creates a hard and fast rule and does not make provision for a variation in crop conditions or other circumstances which may arise, and, for this reason, they urge that the Act is arbitrary, unreasonable and capricious. R. 40-41 and brief of appellants, point D.

The contention is wholly without merit.

Rate making is a legislative function whether exercised by the legislature or by a subordinate body to which such power has been delegated.

Knoxville v. Knoxville Water Works, 212 U. S. 1.

The Georgia Act undertakes only to prescribe maximum fees and charges and such rates are prescribed for operation in the future. Present conditions and past experience are relevant and pertinent only insofar as they enable the rate making body, whether it be legislature or business board, to forecast the future and determine reasonable rates for application during such future period. The courts must test the validity of such enactment in the light of presently known and existing conditions and circumstances. If a rate, whether prescribed by legislative enactment, or order of a regulatory board by reason of changed con-

ditions or circumstances, becomes confiscatory as applied to the business of any particular person, courts can relieve and protect that person when such circumstances or conditions are shown to exist.

"A statute valid when enacted may become invalid by a change in the conditions to which it is applied." *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U. S. 405; *Smith v. Illinois Bell Telephone Company*, 282 U. S. 162; *Des Moines Gas Company v. Des Moines*, 238 U. S. 153; *Lincoln Gas Company v. Lincoln*, 250 U. S. 256; *Brush Electric Company v. City of Galveston, et al.*, 262 U. S. 443; *Bluefield Water Works, v. Pub. Ser. Comm. of West Virginia*, 262 U. S. 679; *Lindheimer, et al. v. Illinois Bell Telephone Company*, 292 U. S. 155.

The Act is not shown to be unconstitutional, arbitrary, unreasonable or capricious in the light of conditions as they now exist. If hereafter, by reason of divergent, varying or fluctuating circumstances or conditions, the act becomes unconstitutional when applied to appellants or any one of them, it will be sufficient time to raise that question when those circumstances may become actual realities.

In addition to the authorities cited above, see *Erie R. Co. v. Williams, Commissioner*, 233 U. S. 685, 699; *Hamilton v. Kentucky Distilleries*, 251 U. S. 146; *Champion v. Ames* (*Lottery Case*), 188 U. S. 321; La *Tourette v. McMaster*, 248 U. S. 465; *Bunting v. Oregon*, 243 U. S. 426; *Standard Oil Company v. Marysville*, 279 U. S. 582; *Zahn, et al. v. Board of Public Works*, 274 U. S. 326; *Fong Yue Fing v. United States*, 149 U. S. 698; *Mountain Timber Company v. Washington*, 243 U. S. 219.

It is respectfully submitted, therefore, that appellants have failed to make good their claim that the challenged Act is un-

reasonable, arbitrary, capricious and unconstitutional for any of the reasons or upon any of the grounds dealt with in this division of appellees' brief.

IV

THE ALLEGATIONS OF THE BILL AS AMENDED AND THE EVIDENCE ADDUCED ARE INSUFFICIENT TO PRESENT A FEDERAL QUESTION FOR DETERMINATION AS TO THE ALLEGED UNREASONABLENESS OF THE GEORGIA ACT FROM THE STANDPOINT OF THE REVENUE PERMITTED THEREBY.

Appellants make the contention that the challenged act is unreasonable, arbitrary and capricious in that, as they contend, their revenue or returns are reduced by its enforcement (See original Bill and First Amendment, R., pp. 10 and 39-44.) Appellees respectfully contend that the record presents no question in that respect to be determined by the Court. An act can be unreasonable from the standpoint of the return or revenue permitted or allowed only when the revenue or return is reduced by the enforcement of the act to the point of confiscation.

The petition as amended discloses that there are forty-four complainants, each operating a separate warehouse business. No proprietor or operator has any pecuniary interest in the business or income of any other operator. The several businesses are prosecuted as individual units and the operators respectively are interested in the business and income only of the unit which he operates. If the operator makes a profit from any particular unit he gets it; if he sustains a loss, he bears it. And while the appellants have a common understanding that the fees or charges made by each for service rendered shall be the same, there is strenuous competition between them for the poundage available in any season or locality. (See Paragraph 12, Court's Finding, R. 81).

Particularly the allegations of the original bill and the amendment with reference to the effect of the act on the tobacco warehouse business from the standpoint of revenue permitted should be noted. In the eighth paragraph of the original bill, subdivision (e), (R. 10) it is generally alleged that the application of the schedule of charges fixed by the act will produce a reduction of from twenty to thirty per centum in the former charges. Following this statement complainants undertake to illustrate by specific examples the manner in which reductions will occur. Subdivision (f) of the eighth paragraph is as follows:

> "The charges prescribed by the aforementioned schedule fixed in said purported act are unjust and unreasonable and will not provide to your orators an adequate reward for the time and service rendered and for the use of their respective properties." (R. 10).

Subdivision (h) of the eighth paragraph is as follows:

> "The said schedule of maximum charges prescribed by said purported act if put into effect, will deprive each of your orators of his, their or its property without due process of law and will deprive him, them or it of the equal protection of the law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, upon which your orators rely." (R. 11).

In the ninth paragraph, speaking with reference to the effect of the enforcement of the act, there is a clause in the following words:

"And which will result in the taking of your orator's respective properties without due process of law," (R. 11) and in the fifteenth paragraph it is alleged that

"Said charges and expenses will work a reduction esti-

mated at twenty to thirty per centum in the charges of your orators resulting in very great loss to them, and the use of their organizations, their time, skill and their plants and equipment on a basis of reward which is very much less than reasonable and which is unjust, unreasonable and confiscatory, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States of America." (R. 13).

In the original bill there is no allegation whatsoever giving to the court any information as to the value of the property employed by complainants or any of them in the tobacco warehouse business nor is there any allegation of fact to indicate what profits they had made under the old rates referred to in their petition nor is the necessary cost of operation set out. The petition contains, as the Court will observe, only general allegations as to the effect of the act from a revenue standpoint and no facts are alleged from which the Court may determine whether the new schedule of rates when applied will yield a fair return or will be confiscatory.

In the first amendment, complainants apparently undertook to remedy this defect in the original bill but in fact the allegations of the amendment help little, if any. These allegations with reference to the revenue effects of the act are to be found in Paragraph Seven of the Amendment (R. 43) as follows:

"The value of the physical properties devoted by the complainants to the tobacco warehouse business in Georgia, including l a n d s, buildings, and equipment, exceeds $1,000,000. In addition to this there is the value of the warehousemen's time, their skill and experience which they devote to this business, this varying with the individual, but it is property and as property must yield a reasonable return. Each warehouseman also uses a large amount of cash as working capital in the operation of the business.

This amount varies with the volume of each warehouse, but the total working capital necessary to carry on this business is in excess of the sum of $500,000.00.

"The gross income of the business is less than six per cent. (6%) of the value of the tobacco crop. The Georgia 1934 crop of tobacco was 38,027,176 pounds valued at $7,131,685.15. The 1933 crop was in excess of 60,000,000 pounds but the value thereof was less than $7,000,000.00.

"The gross expenses of operating the tobacco warehouse business in Georgia are in excess of four and one-half per cent. (4½%) of the value of the crop.

"If the scale of charges sought to be applied by the purported Act of the General Assembly of Georgia of 1935, had been in force during the 1934 tobacco selling season, the gross income of the business would have been reduced by not less than twenty-five per cent. (25%), so that on the minimum basis of a million and one-half dollars, which is merely the value of the physical properties used, there would be no return on this value, as expenses would have equalled income. It is alleged, however, that the value of the properties used, including the personal element of time, skill, and experience of the warehousemen, is far greater than a million and one-half dollars and the gross expenses exceed four and one-half per cent. (4½%) of the value of the tobacco crop."

It will be observed that these allegations are made with reference to the warehouseman, the property employed, the expenses of operation and the rate of return as a group. No facts whatsoever are alleged with respect to any particular individual complainant or his business.

The allegations are insufficient to raise any question for determination by this Court.

Paragraphs six of the original answer and one and five of the supplemental answer appropriately challenge the sufficiency of

these allegations. (R. 29, 46, 47). In connection with this contention we invoke two well established rules of law.

1. PLEADINGS AND EVIDENCE ON AN ISSUE AS TO THE UNREASONABLENESS OF A SCHEDULE OF RATES FROM A REVENUE STANDPOINT MUST BE DEFINITE AND CERTAIN.

The first rule to which we refer is stated in the preceding caption of this division.

In *L. & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, H. N. 8, the court states the rule as follows:

> "A case of confiscation entitling a carrier to injunctive relief against an order fixing maximum intrastate freight rates on certain commodities between specified points is not made by a bill which, apart from general averments, merely alleges that certain specified losses in revenue will result, without any showing as to the value of property employed, the expenses of operation or the return which will be permitted under the rates prescribed."

The rule was followed in *Aetna Insurance Company v. Hyde*, 275 U. S. 440. That case was very similar in its facts to the instant case. There a complaint was brought by one hundred and fifty-six companies, being all of the stock fire insurance companies engaged in the fire insurance business in the State of Missouri. The complaint, in addition to seeking a review of a rate order of the Superintendent of Insurance in the state court, complained that the prescribed rates were unreasonable, inadequate and confiscatory and that the enforcement of the rate order would operate to deprive the petitioners and each of them of their property without due process of law in contravention of the Fourteenth Amendment to the Federal Constitution. The complaint contains specific allegations with reference to the insur-

ance business as a whole, showing that the prescribed rates were so low that the rate order in its operation generally would compel the companies to operate at a loss. These allegations, almost identical with the purport of the first amendment to the bill of complaint in the instant case are found on page 443 of 275 U. S. of the *Aetna Insurance Company case*. Certainly those allegations showed that in its general operation, the rate order would make the business of stock fire insurance unprofitable to those engaged in it and yet the court held that no Federal question was presented by the complaint. The Court, addressing itself to the question at issue, at page 447 of 275 United States, said:

> "Allegations asserting in general language that the finding, order and reduced rates are confiscatory and repugnant to the Fourteenth Amendment are not sufficient. In order to invoke the constitutional protection, the facts relied on to restrain the enforcement of rates prescribed under the sanction of state law must be specifically set forth, and from them it must clearly appear that the rates would necessarily deny to the plaintiff just compensation and deprive it of its property without due process of law. *L. & N. R. Co. v. Garrett*, 231 U. S. 298, 314; *Atlantic Coast Line v. Florida*, 203 U. S. 256. Jurisdiction of this court to set aside state-made rates as confiscatory will be exercised only in clear cases. And the burden is on one seeking that relief to bring forward and satisfactorily prove the invalidating facts."

Speaking further to the same point the Court at page 448 of 275 U. S., said:

> "The complaint did not allege any facts to show that the reduced rates were confiscatory as to any company. The court was not called upon to determine whether the order would operate to deprive any company of its property without due process of law."

Even if complainants in this case comprised one large company, involving only one legal entity, the facts as pleaded are not sufficient to call for a decision by this Court on the question of confiscation or reasonableness of the Act from a revenue standpoint as applied to the aggregate property, service and income of the group, and certainly it cannot be said that the allegation of the bill as amended disclose any fact indicating that the rates prescribed are unreasonable from the standpoint of revenue permitted thereunder when applied to the individual businesses of the several appellants or to the individual units of the businesses represented by the appellants respectively.

The question of the insufficiency of the bill of complaint as amended in this respect was raised in the trial court and complainants were given the right by the court to amend the complaint so as to show the effect of the statute from a revenue standpoint as to each complainant separately and to introduce evidence thereon. (See order January 31, 1936, R. 61). Appellants elected not to amend and did not introduce additional evidence. That they did not do so can be easily accounted for by the fact that the evidence shows beyond any dispute or question that a large number of appellants are making and can make substantial or large profits under the statutory charges. See order January 31, 1936, R. 61; Motion and Order July 15, 1936, R. 70-74; page 2 Court's Finding and Conclusion, R. 75-76.

2. APPELLANTS CANNOT IN THE AGGREGATE OR BY THE ENTIRE GROUP OF WAREHOUSEMEN ATTACK THE ACT AS UNREASONABLE FROM THE STANDPOINT OF REVENUE PERMITTED.

The other rule of law which we desire to invoke is that the plaintiff cannot *en masse* or in the aggregate or by groups attack the act in question as unreasonable on the ground that the reve-

nue permitted thereunder would be insufficient and that thereby they as a group will be deprived of their property without due process of law. This question can be raised only by the individual proprietor or unit.

The reason for this rule is obvious. The rates in question are applicable to all companies alike operating in a single territory and in competition with each other. In such case, some of them will make a fair profit or return and probably others would not. But certainly no warehouseman whose return or profit under the schedule of rates prescribed by the act is fair and reasonable would be entitled to attack the act as unconstitutional because his competitor under that schedule was unable to make a fair profit. Yet this is exactly what appellants are endeavoring to do. In practice each appellant wages warfare against his competitor, the other appellants herein, for available poundage, but after that warfare has been waged and won the same appellant, who is making a fair return and good profits under the new schedule of rates undertakes to claim that the income of such competitor, necessarily reduced by the warfare, is not sufficient to satisfy due process of the Fourteenth Amendment to the Federal Constitution, and that accordingly higher rates should be maintained for the benefit of both himself and his less fortunate competitor. Clearly the warehouseman whose profits or return is inadequate, alone can attack the act on the ground that it is unlawful from the standpoint of revenue permitted.

In the case of *Heald v. District of Columbia*, 259 U. S. 114, 123, the Court said:

> "It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him."

In *Plymouth Coal Company v. Pennsylvania*, 232 U. S. 531, 544, the Court said:

> "We may once more repeat what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution must show he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Federal Constitution."

In *Thomas Cusack Company v. Chicago*, 242 U. S. 526, 530, the Court said:

> "He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property."

In *Arkadelphia, etc. Company v. St. L. Sw. R. Co.*, 294 U. S. 134, 149, the Court said:

> "It is most thoroughly established that before one may be heard to strike down state legislation upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the unconstitutional feature."

We refer again to the case of *Aetna Insurance Company v. Hyde*, 275 U. S. 440. Attention has already been called to the similarity in purpose and scope of that proceeding to the instant case. Dealing with the question presented the Court, at pages 446 and 447 of 275 U. S., said:

> "The reduced rates are applicable to the business of all companies alike and without regard to the amount of the past or prospective profits or losses of any of them. And the attack is by joint action of all the companies. It is not

claimed by or in behalf of any company that, when applied to its business, the reduced rates are or would be too low to permit the company to make a reasonable profit or to have just compensation for its contracts of insurance.

"No company receiving just compensation is entitled to have higher rates merely because of the plight of its less fortunate competitors. Companies whose constitutional rights are not infringed may not better their position by urging the cause of others. *Supervisors v. Stanley*, 105 U. S. 305, 311; *Heald v. District of Columbia*, 259 U. S. 114. As a practical matter of business, it is impossible in the long run for some companies to collect higher premiums than those charged by others in the same territory. Rates sufficient to yield adequate returns to some may be confiscatory when applied to the business of others. But the latter have no constitutional right to prevent their enforcement against the former. The Fourteenth Amendment does not protect against competition. Moreover, 'aggregate collections' sufficient to yield a reasonable profit for all do not necessarily give to each just compensation for the contracts of insurance written by it. It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business. *Aetna Insurance Company v. Hyde*, 275 U. S. 446, 447.

At page 448 in the same case the court proceeds as follows:

"The petitioners are competitors and each carries on business for itself. While they may be joint action pursue the remedy given by Sec. 6284, it does not follow that the Constitution safeguards aggregate profits sufficient to constitute just compensation for all the companies. The complaint fails to show any joint interest or right in or to the business covered by the rates or the protection sought to be invoked. And it fails to show that the business in Missouri

of each is so well and economically organized and carried on that petitioners are entitled, as of right protected by the Constitution, to have premiums amounting in the aggregate enough to yield a reasonable return or profit to all the companies. . . . No federal question is presented."

As stated above, appellants in their bill as amended deal with the value of their properties, the value of their service and their gross and net incomes in the aggregate. For the sake of argument, it might be conceded that they jointly and as a group, might raise the question as to the legislative power to enact the law, but the issue as to whether or not it is reasonable from the standpoint of revenue permitted is entirely different. The group cannot raise that issue for the individual, the individual cannot raise it for the group and plainly no individual or business unit can raise it for another individual or business unit in which the complainant is in no way interested or concerned. In the instant case the right of each complainant to obtain relief from the charges upon the alleged ground that the act is arbitrary and unreasonable in that it does not permit sufficient revenue to appellants, must be separately raised and determined according to the evidence with reference to each individual operation. Those who own a negligible or small amount of property and are enjoying a considerable profit under the statutory rates, obviously cannot say that this law infringes any of their constitutional rights insofar as the revenue permitted is concerned. If warehouse operators using property of much greater value can successfully make out a case of confiscation entitling them to higher rates and they choose to invoke the Fourteenth Amendment, they have the right to do so. It would certainly be convenient for such operators, if any, who could prove confiscation to hold up the rates for the benefit of all so that all might make greater profits and so that the infringed operators might continue to compete for business with less extravagant warehousemen, but

the Fourteenth Amendment does not provide any such convenience.

V.

PRESUMPTION AND BURDEN OF PROOF

The statute is presumed to be constitutional and this presumption extends to every ground of attack made upon it by the bill and the evidence. *Munn v. Illinois*, 94 U. S. 123; *Gitlow v. New York*, 268 U. S. 652; *Arizona Copper Co. v. Hammer*, 250 U. S. 400.

It is also proper to examine the nature of the burden of proof which the law places upon appellants here. The weight of evidence required in such cases has been fully stated by the Court and it is plain that the rule requires pleadings and evidence of the most convincing character. In *Knoxville v. Knoxville Water Company*, 212 U. S. 1, 8, the Court says that the power of courts to declare state statutes unconstitutional and void, "ought to be exercised only in the clearest cases." In *Hyde v. Aetna Insurance Company*, 275 U. S. 440, 448, it is said:

> "The facts relied on to restrain the enforcement of rates prescribed under the function of state law must be specifically set forth and from them it must clearly appear that the rates would necessarily deny to the plaintiff just compensation and deprive it of its property without due process."

In *Georgia Railway Co. v. Railroad Commission of Georgia*, 262 U. S. 634, the Court said that the evidence in such cases must be such as to "compel a conviction that the rates would prove inadequate."

In *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U. S. 287, Mr. Chief Justice Hughes, speaking for the

Court, says that in such cases the complainant has the burden of proof and the Court may not interfere with the exercise of the state's authority unless confiscation is "clearly established."

In *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U. S. 39, Mr. Justice Cardozo, speaking for the Court, says that in such cases "the burden of proof rests heavily on applicant."

In *Lindheimer v. Illinois Bell Telephone Co.*, 292 U. S. 151, Mr. Chief Justice Hughes, speaking for the Court, said that in such cases the complaintants "have the burden of making a convincing showing."

In *L. & N. Ry. Co. v. Railroad Commission*, 208 Fed. 35, 42, the Circuit Court of Appeals for the Fifth Circuit said:

> "The judiciary is not permitted to interfere with the rates established by legislative authority unless it is made to appear clearly and beyond reasonable doubt that they are unreasonable and that their enforcement would be equivalent to the taking of property for public use without just compensation. If the evidence offered leaves the Court in doubt, if it is not clear, satisfactory, and convincing, the rate fixed by state authority should not be enjoined."

Certainly appellants have not made the convincing and satisfactory case required in such cases. The evidence is so voluminous it would not be possible to discuss it in this brief except in very broad outline. There are certain features of the case as developed by the evidence, however, to which we wish particularly to call the Court's attention.

1. In the first place it will be noted that appellants limit their evidence for the most part with respect to their operations, income, etc., to the years 1931 to 1935, inclusive. Practically

no evidence is given with respect to earnings or profits prior to the year 1930. The period selected by appellants for a test of the operations of the law under attack, therefore, includes years occupying the lowest point of an intense financial depression. Further it is to be noted that in one of the years included in the test period, to-wit, the year 1932, there was almost a complete failure in the tobacco crop. The value of the crop for that year was less than any year for which statistics on the tobacco industry are available except the years 1917, 1918 and 1922. (Complainants' Exhibit No. 15, R. p. 706.)

If the volume and value of the crop for the five years preceding 1930 be compared with the volume and value of the crop from 1931 to 1935, it will readily be seen how far the selected period is from a representative or average period. For instance, the average annual volume expressed in pounds from 1931 to and including 1935 is only 47,671,333 pounds per year, while the average for the years 1925 to and including 1929 is 65,298,347 pounds per year. The average price for the years 1931 to 1935 inclusive is 13.35c per pound while the average price from 1925 to 1929 is 17.28c per pound. (See Evidence H. H. Gardner, R. 460.) The annual average proceeds in dollars received from the crop from 1931 to and including 1935 in dollars and cents was $6,363,126.66 per year, while the average value or proceeds from the crop from 1925 to and including 1929 was $11,125,636.65 per year. The annual average difference in value, therefore, is $4,762,537.00 approximately. This difference was more than the entire value of the crops for 1931 and 1932, two of the years selected by appellants as the test period.

The 2½% commission charged by the warehousemen and which is not affected by the act, alone, when computed on this annual average difference, makes an annual average income of

$119,063.00 approximately, and if it be assumed that forty warehouse units are operating in the Georgia territory, the increase average annual income, based on the commission charge alone, would increase the income of the several warehousemen more than $3,000.00 each per year above the average annual income made or received by them during the test period.

While 1935 was the best season since 1929 from the standpoint of the warehouseman's operations, at the same time it is true that none of the other years included in the test period can be considered representative or normal.

When it appears, therefore, that the evidence of appellants is limited to the years 1931 to 1935 inclusive and that they have failed to show with any definiteness at all the income or profits from other years it certainly cannot be held, even if their evidence were otherwise sufficient, that they have shown confiscation or that the act is unreasonable from the standpoint of the revenue permitted within the rule stated in the cases hereinbefore cited.

2. In the second place it will be noted that there is no uniformity in the operation of appellants as to methods, expenses, and amounts paid for what appellants term skilled labor and there is a complete lack of accurate information with reference to their operations. For instance, very few of the operators own or claim to own the warehouses in which they conduct their businesses; and for those who do not own their warehouses there is a very decided difference as to amounts paid as rents for similar warehouses. W. E. Fenner and his associate paid a rental of $5,000.00 for the Farmers Warehouse at Moultrie in 1934 only for the tobacco season of practically one month. In 1935 the rental paid for the building for the season of practically one month was $5,055.00. (Evidence J. B. Fenner, R., p. 344.)

H. B. Wallace in 1935 paid $4,000.00 for rent on the Peoples Warehouse at Moultrie, Georgia, for the tobacco season. F. W. Brown in 1935 paid $3,500.00 for a warehouse at Nashville, Georgia, for the tobacco season, and Claude B. Strickland paid the same amount for a warehouse at Nashville, Georgia, while Townsend and Bernard paid only $1.00 per thousand pounds of tobacco sold for the use of a warehouse at Adel, Georgia, for the season and Paul Morgan paid $1.25 per thousand pounds for the use of a warehouse at Blackshear for the same season, and L. C. Pruitt paid $1.50 per thousand pounds of tobacco sold for the use of a warehouse at Waycross, Georgia, for the same season. These are merely examples. The record abounds with evidence disclosing a lack of uniformity in the amount paid or agreed to be paid by the warehousemen for the use of warehouses of similar capacity and composition throughout the territory.

Another instance of a lack of uniformity is found in the amounts paid to skilled labor, such as auctioneers, in the operation of these warehouses. In some instances the prices paid to auctioneers run as high as from $1,000.00 to $1,200.00 for services during the tobacco season in Georgia, while in other instances the price paid for competent auctioneers runs as low as from $300.00 to $400.00. There will also be found noticeable discrepancies in the amounts paid for common labor used in the operation of the several warehouses. Another instance will be found in the amount of exchange charged by the banks. At Vidalia the charge for exchange appears to have been reduced at the instance of the warehousemen to one-eighth of one per cent., thereby saving the warehousemen for 1935 several hundred dollars. (Evidence W. W. Bernard, R., p. 343.)

On the whole the records of the warehouseman and the evidence given by them with reference to their charges and services

even for the five years which they undertook to cover is far from complete and no evidence is given whatsoever in the record from which the average cost of the property or facilities used by the warehousemen over a period of five years can be ascertained. (Evidence H. H. Gardner, R., p. 459.) There is the utmost confusion, uncertainty and lack of accurate information as to the results of their operations. This consideration is offered as an argument that appellants have failed to establish that the rates under attack are unreasonable from a revenue standpoint as applied to their businesses in that convincing and compelling manner that the law in such cases requires.

3. An incident of the burden which appellants are required to carry is that they must show clearly and convincingly that their several businesses have been operated economically and efficiently. An examination of the record discloses a lack of efficiency and economical management. Examples only can be referred to in this brief but what is said here as to specific instances generally applies to the operations of appellants as a whole. Reference has already been made to the excessive rents paid by some of the appellants. They themselves concede that the rents paid are excessive. They are substantially more than are paid in other states. (Evidence J. B. Fenner, R., p. 344, 346; Evidence W. E. Fenner, R., p. 290.) Some of the warehousemen made a practice of loaning or advancing money to their customers. One of the appellants for 1935 shows a loss from this source of $1,164.95. (Evidence W. W. Bernard, R., p. 341.) See also evidence R. A. George, R. 232. F. W. Brown operated one of the warehouses at Nashville, Georgia, and is or was president of the Warehousemen's Association. During the 1935 season, lasting something like three weeks, the warehouse operated by him actually lost tobacco of the value of $1,700.00 for which no account could ever be made. The item is charged as expense of operation. (Evidence F. W. Brown, R., p. 205, 206.)

Claude B. Strickland also operated a warehouse at Nashville, Georgia, and it is shown that the warehouse operated by him during the season of 1935 lost tobacco of the value of $1,211.00. The item is charged as expense of operation. (Evidence C. B. Strickland, R., p. 256.)

Other losses in substantial amounts are shown not only in the case of Strickland and Brown but many other warehouse operators. Certainly such losses cannot be attributable to anything except carelessness or lack of efficiency.

It is asserted that practically all of the appellants were extravagant in the matter of employing solicitors for their several warehouses. For instance, L. C. Pruitt, operating one of the warehouses at Waycross, Georgia, spent during the 1935 season approximately $2,100.00 primarily, as he testified, for influence of prominent farmers in the county. (Evidence L. C. Pruitt, R., p. 358). He also contributed to the Chamber of Commerce the sum of $750.00 to be used in hauling tobacco from the territory to the Waycross market, a practice condemned by the Association as unethical and vicious. W. E. Fenner paid amounts to solicitors as follows: $220.00 to Martin Kirby, a local farmer; E. L. Ring, a local farmer, $547.40; W. L. Guthrie, $210.00; W. P. Kicklighter, a hardshell Baptist preacher (the amount paid is not stated), but Fenner stated that Mr. Kicklighter was employed as a solicitor because he (Fenner) thought he could control his congregation; H. B. Powers was paid $157.50, and S. I. Fleetwood $900.00, being a local solicitor. (R., p. 308,309.)

The instances cited are typical. The items of other expenses deducted by some of the warehousemen should be noticed. Take for instance B. B. Saunders who operates at Valdosta, Georgia. His statement indicates that during the 1935 season his gross receipts from auctioneers fees, weighing and handling charges

and commissions was $28,818.85. The general statement submitted is as follows:

"Gross Receipts		$28,818.85
Operating Expense	$16,464.31	
Rent	3,500.00	19,984.31
		8,834.54
Deposited with Clerk		4,811.93
Cleared Net		4,022.61"

Upon request that the operating expense item be broken down the figures were given as follows:

"Common Labor	$2,416.75
Salaries	5,846.77
General Expense	5,103.11
Interest on Purchase Money Contract for Warehouse	1,072.52
Exchange on Deposit	1,605.10
Lost Tobacco	158.62
Difference in checks	53.61
Advertising	227.90"

And upon further request that the item of expenses designated general expenses in the sum of $5,003.11 be further broken down the items composing the same were given as follows:

"Gas and tires	$704.64
C. L. Carter, Gas	32.73
Gas	500.00
Gas, Carter	33.88
Expense, White Sulphur Springs Convention	700.00
Georgia Tobacco Association	100.00
L. W. Goodman, Secretary Georgia Warehouse Association Bond for warehouse	56.82
Good Faith Deposit with Georgia Warehouse Association	250.00
Valdosta Tobacco Board of Trade	35.00
Balance on one Chevrolet automobile	348.18"

It is obvious that several of the items charged in this account could not properly be assessed as expenses against the warehouse operation. For instance, the item of $1,072.52 shown as interest on the purchase money for the warehouse building and the expense of $700.00 for a trip to White Sulphur Springs Convention and the sum of $348.16 as a balance on a Chevrolet automobile, and when such items are eliminated it appears that Mr. Saunders made from his operation in 1935, covering a period of practically three weeks active operation, the sum of $6,000.00, computing his charges and fees according to the statutory schedule. Evidence H. B. Glisson, R. 158-170.

There is another item which the warehousemen designated as bank exchange which should be noted. They claim that it costs more to operate in Georgia than in the Carolinas and Virginia and one reason assigned for the alleged difference in operating costs is the bank exchange item which, in fact, is nothing more than a service charge of $2.50 per $1,000 paid to the banks in the territory, not for the use of borrowed money, but for paying out money that belongs to the warehouseman. The impression is general that the so-called exchange item paid to the banks is excessive and it is conceded that it is burdensome. In fact, the amounts paid are substantial. It is obvious, too, that this evil could be remedied and it is one which the warehousemen themselves might remedy. It appears that in North Carolina the warehousemen acting in cooperation have accomplished much in correcting this evil and it further appears that at least in one town in the Georgia territory a reduction in the exchange rate has been made to half the amount that is paid in the other towns. (Evidence W. W. Bernard, R., p. 343; Evidence R. A. George, R., p. 226,227.) At least one of the warehousemen in addition to the payment of interest on borrowed money at 8% and the exchange rate of $2.50 for each $1,000 paid out, paid the

sum of $750.00 as a bonus for financial assistance during the season of 1935. (See evidence H. B. Wallace, R., p. 321, 322, 327.)

4. It will also be necessary for the Court to determine what effect competition, as between the warehousemen themselves, has had on their earnings. It must be remembered that the territory in which bright leaf tobacco is grown in South Georgia is limited and accordingly the volume produced from year to year is also limited. The evidence discloses without contradiction that warehouses have been built and are being operated out of proportion to the available volume of tobacco to be sold and the reasonable needs of the industry. (Evidence R. E. Currin, R., p. 530; evidence J. H. McLean, R., p. 391; evidence R. A. George, R., p. 237.) Further it is to be noted that as between the warehousemen themselves competition is keen. (Evidence Claude B. Strickland, R., p. 255; evidence H. B. Wallace, R., 328, 329; evidence W. E. Fenner, R., p. 308, 312.)

In paragraph 19 the court made a finding as follows:

> "It is not proven what each or any warehouseman, individual or corporate, lost in revenue by reason of the scale of charges prescribed by the act attacked. It is not denied that some warehousemen earned a satisfactory profit. It is not proven that in instances where a loss occured such loss was not due to excessive competition, ill-advised loans, unnecessary expenses in buying influence or hauling customers' tobacco, or other causes than the reduction in charges. The testimony as to the effects of the act attacked is as to the group of warehousemen who are complainants, rather than to the effect on each one, and even then it is not proven that all the losses are traceable to the reduction in charges rather than to other causes." (R., pp. 84-85.)

Error is assigned on this finding and the contention is made that it is contrary to the evidence and without evidence to support it

and that it is contrary to law in that said finding puts on complainants an undue burden of proof. (R., p. 102.)

What has been said above in this division of appellees' brief is sufficient, we think, to indicate that the finding is supported by evidence.

The Court in the case of *Public Service Commission of Montana v. Great Northern Utilities Company*, 289 U. S. 130, dealt with the question of competition as related to the guarantee provided by the Fourteenth Amendment of the Federal Constitution. The Court said:

> "The facts disclosed by the record compel the conclusion that, if competition shall continue in the future as in the past, appellee will not be able upon any rates within constitutional protection against reduction to earn a reasonable return upon the value of its property employed in the public service. The due process clause of the Fourteenth Amendment safeguards against the taking of private property, or the compelling of its use, for the service of the public without just compensation. *Raegan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 410, 38 L. ed. 1014, 1027, 14 S. Ct. 1047, 4 Inters, Com. Rep. 560; *Smyth v. Ames*, 169 U. S. 466, 546, 42 L. ed. 819, 849, 18 S. Ct. 418; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41, 53 L. ed. 382, 395, 29 S. Ct. 192, 48 L. R. A. (N.S.) 1134, 15 Ann. Cas. 1034; *Missouri P. R. Co. v. Tucker*, 230 U. S. 340, 347, 57 L. ed. 1507, 1509, 33 S. Ct. 961; *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352, 434, 57 L. ed. 1511, 1555, 33 S. Ct. 729, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916-A, 18; *Public Utility Comrs. v. New York Teleph. Co.*, 271 U. S. 23, 31, 70 L. ed. 808, 812, 46 S. Ct. 363. But it does not assure to public utilities the right under all circumstances to have a return upon the value of the property so used. The loss of, or the failure to obtain, patronage due to competition does not justify the imposition of charges that are exorbitant and unjust to the public.

> The clause of the Constitution here invoked does not protect public utilities against such business hazards."

See also *Aetna Insurance Company v. Hyde*, 275 U. S. 440; *Covington & Lexington Turnpike Road Company v. A. P. Sanford*, 164 U. S. 578; *San Diego Land & Town Company v. Jasper*, 189 U. S. 439; *Darnell v. Edwards*, 244 U. S. 564.

It is therefore submitted that the finding was not only supported by the evidence but is in accord with the principles of law applicable to such cases.

5. Furthermore, in the determination of what is a reasonable schedule of rates consideration must be given to the value of the service rendered to the growers. It is a well known rule of law that in determining the question of the reasonableness of a rate, the rights of the public are not to be ignored. In other words, the matter must be considered from the standpoint of the man who pays the rates as well as from the standpoint of the person who receives them. Under this rule not more can be exacted for any particular service rendered than that service is reasonably worth to the person to whom the service is rendered. The principle was stated in *Smyth v. Ames*, 169 U. S. 466, in the following words:

> "What the company is entitled to ask is a fair return upon the value of that which it employes for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

When the service rendered by the warehousemen is considered therefore from the standpoint of the value of that service to the grower, where do we find in the record any evidence that the rate prescribed by the act is unreasonable or inadequate?

This necessarily follows whether consideration is given to the effect of the act from the standpoint of the aggregate cost to the growers to market their crops or whether consideration be given to the value of the service from the standpoint of the individual transactions and service rendered, attending the sale in the ordinary, usual way of selling tobacco.

So that appellants have not made a case entitling them, jointly or severally, to relief under the contention that the act is unreasonable and arbitrary from the standpoint of revenue permitted or otherwise. Certainly such fact does not appear "clearly and beyond reasonable doubt."

VI.

CONCLUSION

The assignments of error are set forth by appellants in ten consecutively numbered paragraphs. (R., pp. 101-105.) Paragraph 3 relates to the finding embodied in the thirteenth paragraph of the court's finding to the effect that

> "The warehousemen have, unless regulated by law, an unduly coercive control over prices charged the growers for services"

and paragraph 6 relates to the twentieth paragraph of the court's finding to the effect that the warehousemen through the Association and their common agreement as to fees to be charged by them for services rendered,

> "Maintain and enjoy a virtual monopoly in the field covered by their operations,"

and paragraph 7 relates to the twenty-first paragraph of the court's finding to the effect that the business of tobacco warehousemen as conducted in Georgia was such as to cause it to be "affected with a public interest" and clothed "with a public use".

In division II of this brief we have dealt with the questions presented by these assignments of error.

In paragraph 9 error is assigned on the finding of the court as set out in paragraph twenty-three of its finding to the effect that the fixing of the scale of prices for services rendered does not burden or interfere with interstate commerce, and in paragraph 10 error is assigned on the conclusion of the court set out in paragraph four thereof, also dealing with the question of of interstate commerce. In Division I of this brief the questions presented by these assignments of error have been fully covered.

In paragraph 8 error is assigned upon the finding of the court embodied in paragraph twenty-two of the court's finding to the effect that the scale of charges prescribed by the Georgia act is not unreasonable, arbitrary or capricious and is reasonably adapted to accomplish the desired results. We have dealt with the legal question presented by this assignment of error in Divisions II, III, and IV of this brief and have therein endeavored to demonstate that the assignment of error is without merit.

Paragraph 2 of the assignment of error contends that the findings set out in paragraph ten of the court's finding to the effect that prior to 1927 the tobacco warehousemen in Georgia for many years had maintained and exacted from sellers of tobacco a uniform schedule of charges substantially, if not identically, the same as the schedule of charges fixed by the Act of 1935. (R., p. 101.) This finding, while incidental and not affecting the real merits of the case is supported by evidence. (See evidence R. E. Currin, R., p. 527; Evidence W. D. Dickerson, R., p. 561; F. W. Brown, R., p. 187, 188; evidence of J. H. McLean, R., p. 392.) See also Defendants' Exhibits 1-a, 2-a, 3, 4, 9 and 10, R., pages 624, 634, 644, 644, 659, and 662. The statements covering sales made by B. B. Saunders Warehouse for Ewell Brown on August 3rd, 1926 (R., pages 660 and 661) are of particular interest in view of the evidence of Mr. Saunders to the effect that the schedule of charges had always been the same as those in effect when the Warehouse Act was passed (R., page

135, Appellants' Brief page 46.) The total amounts of $1.44 warehouse charges, and $2.55 auction fees, shown on the statement at page 660 of the record could not have been arrived at by application of the schedule in effect in 1927 and after that time (See statements R., pages 662 and 663), but obviously were arrived at by application of a schedule substantially the same as fixed by the Act. Application of the statutory rate to the items in pounds shown R., page 660, for instance, will give results as follows:

Pounds	W. Charges	A. Fees
24	.10	.15
90	.10	.15
144	.14	.25
100	.10	.15
180	.18	.25
170	.17	.25
136	.13	.25
124	.12	.25
136	.13	.25
144	.14	.25
130	.13	.25
Total W. Charges	$1.44	Total A. fees $2.45

The statements for 1927, 1930, and 1931, from the B. B. Saunders Warehouse to growers (R., pages 662 and 663) show that the higher schedule was applied. Obviously Mr. Saunders' memory is at fault.

In paragraph 4 of the assignments of error exception is taken to the finding of the court contained in paragraph seventeen of its finding to the effect that the propriety of charging materially or any more for handling tobacco in Georgia than in the Carolinas is not established, thereby contending that this finding is contrary to the evidence and without evidence to support it. While the finding is incidental and unnecessary to the adjudica-

tion of the case herein involved it is respectfully submitted that when all the evidence is considered the finding is supported and justified.

In paragraph 5 of the assignment of error (R., p. 102) it is contended that the finding of the court set out in paragraph nineteen of its finding is without evidence to support it and is contrary to law in that such finding puts on appellants an undue burden of proof. We have dealt with the question presented by this assignment in subdivisions 2, 3 and 4 of Division V of this brief and respectfully submit that the contention is wholly without merit.

Paragraph 1 of the assignments of error relates to the final judgment entered by the court on the 27th day of November, 1936. It is contended that this finding or judgment of the court is contrary to the evidence, without evidence to support it and contrary to law. In conclusion it is submitted that the assignment of error is without merit. The evidence supports the findings of the District Court and the findings sustain the decree entered and the decree should be affirmed.

Respectfully submitted,

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